

CLERK'S COPY.

439

653307

Sup. Ct.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 354

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

ELLIOTT H. WHEELER AND HOLLO C. WHEELER,
EXECUTORS OF THE ESTATE OF JOHN H. WHEELER,
DECEASED, CORNELIA W. GOOD, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR HABEAS CORPUS FILED AUGUST 18, 1944

HABEAS CORPUS GRANTED OCTOBER 19, 1944

No. 10538

United States
Circuit Court of Appeals
For the Ninth Circuit.

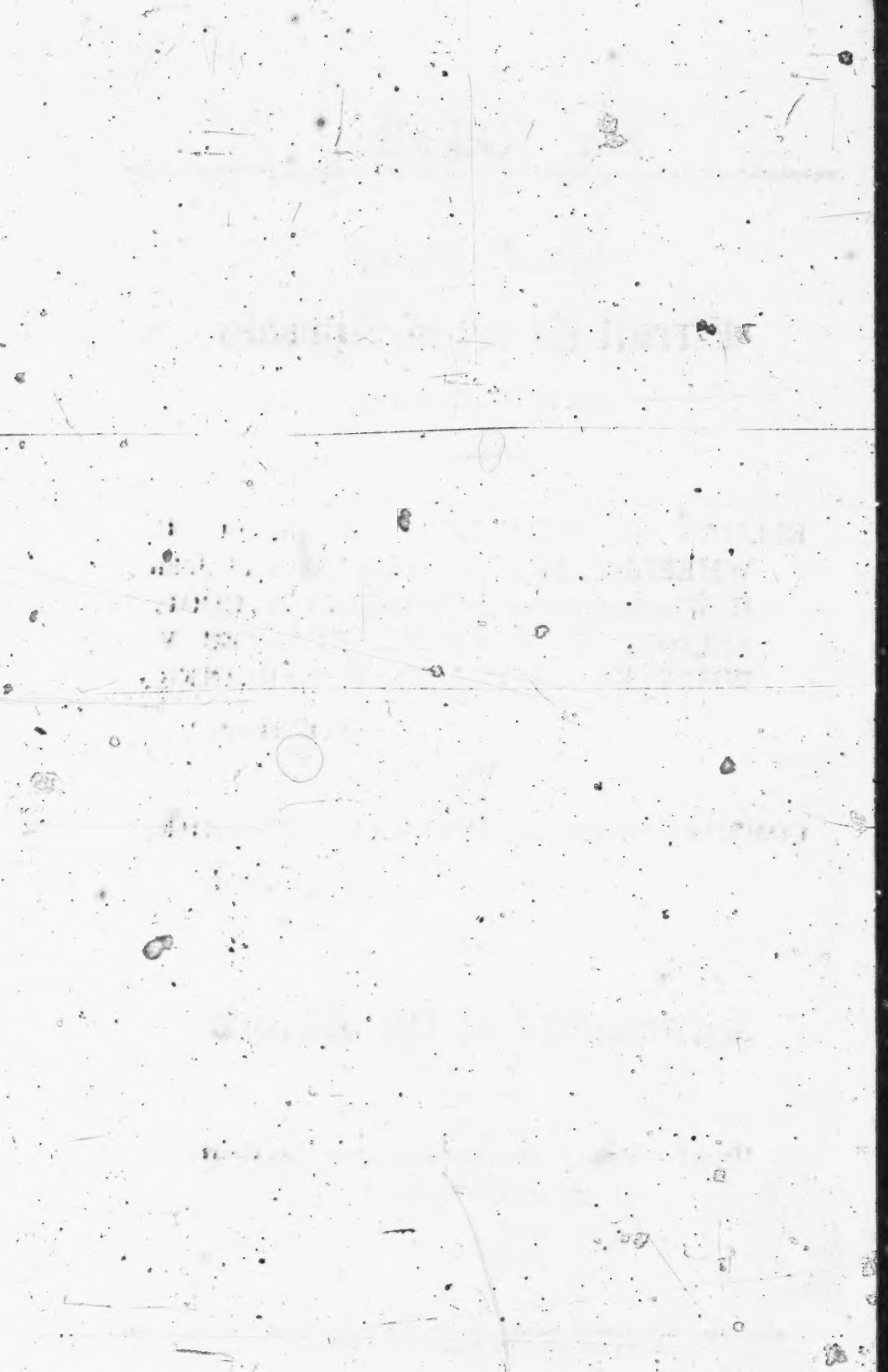
ELLIOTT H. WHEELER and ROLLO C.
WHEELER, Executors of the Estate of John
H. Wheeler, deceased, CORNELIA W. GOOD,
ELLIOTT H. WHEELER, FRANCES V.
WHEELER and YSABEL F. BERLINER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review Decisions of the Tax Court
of the United States



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italics*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

	Page
Answer (No. 107255)	27

Appearances:

No. 107255	1
No. 107258	97
No. 107260	101
No. 107263	105
No. 107265	109

Certificate of Clerk To Transcript of Record on Review:

No. 107255	95
No. 107258	100
No. 107260	104
No. 107263	108
No. 107265	112

Decision:

No. 107255	82
No. 107258	99
No. 107260	103
No. 107263	107
No. 107265	111

Designation of Contents of Record on Appeal

(No. 107255)	93
--------------------	----

Index	Page
Designation of Record (CCA)	119
Docket Entries:	
No. 107255	1
No. 107258	97
No. 107260	101
No. 107263	105
No. 107265	109
Opinion	57
Motion to Consolidate Proceedings	115
Order for Consolidation of the Record	114
Petition for Redetermination of Deficiency (No. 107255)	3
Exhibit A—Notice of Deficiency	10
Exhibit B—Letter, July 19, 1940, Internal Revenue Agent to Rollo C. Wheeler en- closing Computation of Earnings and Profits Accumulated of John H. Wheeler Co.	15
Exhibit C—Thirty Day Letter, Internal Revenue Agent to Rollo C. Wheeler, Executor, enclosing Copy of Report of Examination of Income Tax Return for Year 1938	19
Petition for Review	83
Notice of Filing	88
Statement of Points on Which Petitioner In- tends to Rely (No. 107255)	90

Commissioner of Internal Revenue **iii**

Index **Page**

**Statement of Points on Which Petitioners on
Review Intend to Rely on Appeal (CCA)...** **117**

Stipulation as to Record (No. 107255) **91**

Stipulation of Facts **30**

**Oral Stipulation read in Record March
28, 1942** **38**

Exhibits for Petitioners:

**1—Copy of Corporation Income and Ex-
cess Profits Tax Return for the John
H. Wheeler Company for the Year
1938** **40-52**

**2—Copy of Income Tax Return of Per-
sonal Holding Company, John H.
Wheeler Company for Calendar Year
1938** **53**

Proceedings in U. S. C. C. A., Ninth Circuit **131**

Order of submission **131**

Order directing filing of opinion and judgment **131**

Opinion, Garrecht, J. **131**

Judgment **130**

Clerk's certificate **130**

Order allowing certiorari **131**

APPEARANCES:

For Taxpayer:

**VINCENT H. O'DONNELL, Esq.,
JOHN D. BRETHAUER, C.P.A.,**

For Comm'r:

HARRY R. HORROW, Esq.,

Docket No. 107255.

**ESTATE OF JOHN H. WHEELER, deceased,
ELLIOTT H. WHEELER, and ROLLO G.
WHEELER, Executors,**

Petitioner,

vs.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

DOCKET ENTRIES

1941

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 12—Copy of petition served on General Counsel.

May 12—Request for hearing in San Francisco, Calif., filed by taxpayer. 5-12-41 copy served.

May 26—Notice of appearance of John D. Brethauer, as counsel for taxpayer filed.

Jul. 8—Answer filed by General Counsel.

Jul. 15—Copy of answer served on taxpayer. San Francisco, California.

1942

Feb. 25—Hearing set March 23, 1942—San Francisco, California.

Mar. 28—Hearing had before Mr. Arnold on merits—Submitted. Counsel moves to consolidate Dockets 107255-58-60-63 and 65, granted. Stipulation of facts filed. Briefs due May 15, 1942. Replies June 15, 1942.

Apr. 20—Transcript of hearing 3-28-42 filed.

May 15—Brief filed by taxpayer. (5-16-42—3 copies received).

May 15—Brief filed by General Counsel. Copy served 5-16-42.

May 16—Copy of brief served on General Counsel.

Jun. 15—Reply brief filed by taxpayer.

Jun. 15—Reply brief filed by General Counsel. Copy served 6-16-42.

Jun. 15—Copy of reply brief served on General Counsel.

1943

Feb. 24—Opinion rendered—Arnold, Judge. Div. 12. Decision will be entered under Rule 50. 3-3-43 Copy served.

Apr. 1—Computation of deficiency filed by General Counsel.

Apr. 3—Hearing set May 5, 1943 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 29—Decision entered. Arnold, Judge. Div. 12.

Jul. 26—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

1943

- Jul. 26—Affidavit of service by mail filed by taxpayer.
- Jul. 28—Proof of service of filing petition for review filed by taxpayer.
- Aug. 18—Statement of points with proof of service thereon filed.
- Aug. 18—Stipulation re record with agreed praecipe attached, filed. [1*]

United States Board of Tax Appeals
Docket No. 107255

ESTATE OF JOHN H. WHEELER, deceased
ELLIOTT H. WHEELER and ROLLO C.
WHEELER, Executors,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing symbols San Francisco Division I.R.A.: 90-D-LB(C:TS:PD:SF:HMS) dated February 12, 1941, and as a basis for its proceeding alleges as follows:

*Page numbering appearing at top of page of original certified Transcript of Record.

1. The petitioner is a fiduciary duly authorized to act for the Estate of John H. Wheeler with business address of 1820 Mills Tower, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on February 12, 1941.

3. The taxes in controversy are income taxes for the calendar year 1938 and in the amount of \$30,695.00. [2]

4. The determination of tax set forth in the said deficiency is based upon the following errors:

a. The assessment herein arises from the erroneous taxation of distributions received upon the liquidation of John H. Wheeler Co., on December 2, 1938 under Sec. 112(b)(7) of the Revenue Act of 1938 as taxable dividends, whereas the corporation actually had a statutory deficit as at the date of liquidation.

b. John H. Wheeler Co. was liquidated under a specific provision of the statute which required exact knowledge of the law as it stood at that time to determine if the liquidation could be effected without prohibitive taxation. The corporation is entitled to have its deficit computed in accordance with accepted law at December 2, 1938 as laid down by all court decisions promulgated before or since that date on the question of earnings or profit of corporations.

c. Section 501(b) of the Second Revenue Act of 1940 properly states the effective date of the appli-

cation of the provisions of Section 501 for the purpose of the transaction herein.

d. The retroactive provision of Section 501(c) of the Second Revenue Act of 1940 is unconstitutional insofar as it singles out one group of closed transactions of taxpayers who had filed petitions before the Board of Tax Appeals prior to [3] September 20, 1940 for immunity from its provisions, while applying the same provisions in a punitive manner to this and other corporations examination of whose transactions identical with or similar to those of the first group were pending before the Treasury Department or had not been initiated.

e. Section 112(b)(7) of the Revenue Act of 1938 was a relief provision, invitational to the liquidation of certain types of corporations. Section 501 of the Second Revenue Act of 1940 is a clarifying measure necessary primarily for the uniform application of the invested capital credit against the excess profits tax which was the subject of the Second Revenue Act of 1940. The law regarding earnings and profits was clearly and unmistakably laid down and affirmed prior to the passage of Section 501. The reasonableness of Section 501(c) in applying retroactively to open transactions and to taxpayers who are put on due notice regarding the effect of the closing of such transactions is not questioned. The singling out and penalizing of closed transactions by retroactive reversal of law is erroneous, inequitable, and in conflict with all principles of American taxation.

f. In the event it is finally held that the corpora-

tion had a surplus resulting in the distribution of taxable dividends upon liquidation, and in the further event that the dividends paid credit for the year 1936 is finally disallowed, the taxable [4] dividends assessed against the shareholders in the year 1938 should be proportionately reduced by the additional corporate income tax for the year 1936 in the amount of \$5,953.06.

7. The facts upon which petitioner relies as the basis of this proceeding are as follows:

a. John H. Wheeler Co. was organized in 1925 by John H. Wheeler and his wife Frances V. Wheeler. Securities with a cost of \$304,684.49 were exchanged for 4,918 shares of capital stock of John H. Wheeler Co. with a par value of \$100.00 per share, or an aggregate of \$491,800.00 in accordance with a permit from the State of California Commissioner of Corporations which specified that the stock of John H. Wheeler Co. could be sold for cash or issued in exchange for standard listed securities to the value of \$100.00 actual market value for each share of capital stock issued. Thereafter the company had a statutory income tax basis for its assets of \$304,684.49, but for purposes of earned surplus it had a cost of \$491,800.00, making a difference of \$187,115.51 representing unrecognized gain to the transferors upon organization.

b. In years subsequent to organization and prior to dissolution in 1938 upon sale of securities acquired upon organization the corporation used the cost of the securities to transferors as cost basis for income tax purposes but computed its surplus account on the

basis of cost of the securities to the corporation. [5]

c. On November 30, 1938 the corporation had a deficit of \$47,501.61 resulting from statutory earnings less statutory deductions and further corporate losses of \$179,314.99 representing the loss on sale of securities acquired upon organization not recognized for income tax purposes.

d. After due consideration of the meaning and intent of Section 112(b)(7) of the Revenue Act of 1938 together with its effect on the situation of the company the corporation was dissolved on December 2, 1938 specifically under and in accordance with the provision of that section. At that date the Board of Tax Appeals had stated its position regarding earnings and profits as involved herein in the cases of Chas. F. Ayers, 12 B.T.A. 284; Ida L. McKenney, 32 B.T.A. 450; Susan T. Freshman 33 B.T.A. 394; W. S. Farish & Co. 38 B.T.A. 150; F. J. Young Corporation 35 B.T.A. 860. Petitioner had no reason to contemplate or anticipate any change in law or procedure which would result in further taxation.

e. At the date of dissolution the John H. Wheeler Co. had:

Securities acquired after April 9, 1938.....	\$ 693.38
Cash	111.84
Deficit	47,501.61

Securities acquired after April 9, 1938 and cash were reported proportionately by the shareholders as long-term capital gains [6] in accordance with Section 112(b)(7)(e)(i) of the Revenue Act of 1938. In view of the deficit no taxable dividends were reported.

f. On July 10, 1940 an examining agent concluded his examination of the records of John H. Wheeler Company in connection with the corporate return for the year 1938 and proposed and secured signed agreements for \$50.00 additional tax for minor adjustments. Notwithstanding the proposed signed agreement for 1938, a letter, copy of which is attached as Exhibit "B", was received shortly after July 19, 1940 which raised the present issue for the first time. About September 4, 1940 a thirty day letter, copy of which is attached hereto as Exhibit "C" was received by this petitioner. The proposed deficiency was protested and discussed in conference on the basis of earnings and profits as covered in the Revenue Act of 1938.

g. The deficiency notice, Exhibit "A", herein contained the first official mention of Section 501 of the Second Revenue Act of 1940.

h. The corporate tax return for the year 1936 was examined by the Treasury Department on or before July 11, 1938 and no contention was made that the 1936 dividend was not paid within the taxable year 1936. Thus the corporation, having no notice of contingent tax liability, made no provision for the 1936 proposed deficiency upon liquidation. [7]

Wherefore the petitioner prays that this Board may hear the proceeding and find that the John H. Wheeler Company had no accumulated earnings or profits at December 2, 1938 which would result in taxable dividends to its shareholders upon dissolution, and that Section 501 of the Second Revenue Act of 1940 could not be made retroactive to apply puni-

tive consequences against a transaction closed and completed under the relief section 112(b)(7) of the 1938 statute which could not have been foreseen or contemplated when the transaction was designed and consummated.

ROLLO C. WHEELER

Executor of Estate of John H.
Wheeler

ELLIOTT H. WHEELER

Executor of Estate of John H.
Wheeler

1820 Mills Tower

San Francisco, California

Counsel for Petitioner:

Vincent H. O'Donnell, Esq.

1820 Mills Tower,

San Francisco, California

John D. Brethauer, C.P.A.

504 Bank of America Building

Berkeley, California [8]

State of California

City and County of San Francisco—ss.

Rollo C. Wheeler and Elliott H. Wheeler, being duly sworn, say that they are the duly appointed, qualified and acting executors of the Estate of John H. Wheeler, deceased and they are duly authorized to and do verify the foregoing petition. They have read the foregoing petition, or had the same read to them and are familiar with the statements contained therein. The statements contained therein are true

except those stated upon information and belief and those they believe to be true.

ROLLO C. WHEELER

ELLIOTT H. WHEELER

Subscribed and sworn to before me this 9th day of May, 1941.

[Seal]

CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California. [9]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, Calif.
February 12, 1941

Office of:

Internal Revenue Agent in Charge

San Francisco Division

IRA:90-D-LB

(C:TS:PD

SF:HMS)

Estate of John H. Wheeler, Deceased,
Rollo C. Wheeler, Executor,
3377 Washington Street,
San Francisco, California.

Sir:

You are advised that the determination of the income tax liability of John H. Wheeler, deceased, for

the taxable year ended December 31, 1938, discloses a deficiency of \$30,695.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 74 New Montgomery Street, San Francisco, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of the return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By (F. M. Harless)

Internal Revenue Agent in
Charge

Enclosures:

Statement

Form of waiver. [10]

STATEMENT

San Francisco
 IRA: 90-D-Lb
 (C:TS:PD
 SF:HMS)

Estate of John H. Wheeler, Deceased,
 Rollo C. Wheeler, Executor,
 3377 Washington Street,
 San Francisco, California

Tax Liability for the Taxable Year Ended
 December 31, 1938

	Liability	Assessed	Deficiency
Income tax	\$35,246.23	\$4,551.23	\$30,695.00

In making this determination of your income tax liability, careful consideration has been given to your protest dated September 25, 1940; to the statements made at the conferences held on October 24, 1940, and January 8, 1941.

A copy of this letter and statement has been mailed to your representative, Mr. Vincent H. O'Donnell, 1820 Mills Tower, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$ 34,079.26
Unallowable deductions and additional income:	
(a) Dividends	\$66,406.69
(b) Farming income	238.02
(c) Legal expense	2,700.00
	69,344.71
Net income adjusted	\$103,423.97

[11]

EXPLANATION OF ADJUSTMENTS

(a) It is held that the earnings and profits distributed in liquidation by the John H. Wheeler Company, under the provisions of section 112(b) (7) of the Revenue Act of 1938 should be determined by

applying the provisions of section 501(a) of the Second Revenue Act of 1940, and that, therefore there should be included in the decedent's taxable income as a dividend received in 1938, the amount of \$66,406.69.

(b) To the decedent's farm income of \$8,351.68 shown on the return there is added the sum of \$238.02 representing certificates of the California Prune & Apricot Growers' Association cashed by the decedent in 1938. As such certificates were not reported as income by the decedent when received, and had no cost basis in his hands, the entire proceeds received are held to be taxable income.

(c) Legal fees of \$3,708.09 claimed as a deduction on the return included fees aggregating \$2,700.00 paid to an attorney and an accountant for contesting an alleged deficiency in gift taxes asserted against the decedent for the year 1935. Such fees are held to be personal expenses and the deduction is disallowed. Section 24(a)(1) of the Revenue Act of 1938.

COMPUTATION OF TAX

Net income adjusted	\$103,423.97
Less: Personal exemption	2,500.00
Balance (surtax net income)	\$100,923.97
Less: Earned income credit (10% of \$3,000.00)	300.00
Net income subject to normal tax	\$100,623.97
Normal tax at 4% on \$100,623.97	\$ 4,024.96
Surtax on \$100,923.97	30,535.90
Total tax	\$ 34,560.86
Total tax (alternative tax in case of a net long term gain or loss)	\$ 35,246.23

Computation of Tax—(Continued)

Correct income tax liability	\$ 35,246.23
Income tax assessed:	
Original, account No. 201907—First California	4,551.23
Deficiency in income tax	\$ 30,695.00

COMPUTATION OF ALTERNATIVE TAX

(Section 117(c)—Revenue Act of 1938)

Net income	\$103,423.97
Plus: Net long-term capital loss	2,141.77
Ordinary net income	\$105,565.74
Less: Personal exemption	2,500.00
Balance (surtax net income)	\$103,065.74
Less: Earned income credit	300.00
Net income subject to normal tax	\$102,765.74
Normal tax at 4 per cent on \$102,765.74	\$ 4,110.63
Surtax on \$103,065.74	31,778.13
Partial tax	\$ 35,888.76
Minus: 30 per cent of net long-term loss	62.53
Alternative tax	\$ 35,246.23

[13]

EXHIBIT "B"

Page No. 1

**Treasury Department
Internal Revenue Service
San Francisco, Calif.**

Office of:

**Internal Revenue Agent in Charge
San Francisco Division**

July 19, 1940

**Rollo C. Wheeler,
c/o Vincent H. O'Donnell
1820 Mills Tower
San Francisco, Calif.**

Re: Liquidation of John H. Wheeler Co.

Dear Sir:

An analysis of the corporation returns of the John H. Wheeler Company filed for the years 1925 to 1938, inclusive discloses that there is a substantial amount of actual net income accumulated by the corporation at Nov. 30, 1938, as indicated by the enclosed computation. Section 112(b)(7)(E) (i) of the Revenue Act of 1938 provides that there shall be taxed as a dividend to each shareholder his ratable share of the accumulated earnings and profits.

A copy of this letter is being mailed to Mr. John D. Brethauer. Kindly contact me as soon as possible so that we may arrange an appointment to verify the enclosed computation and determine the

16

Elliott H. Wheeler et al vs.

correct deficiency against the 1938 return of John
H. Wheeler, Deceased.

Very truly yours,

J. GOLDBERG

Internal Revenue Agent

Enc.

G:B [14]

JOHN H. WHEELER CO.

Computation of earnings and profits accumulated

Commissioner of Internal Revenue 17.

(1) Year	(2) Net Income per return	(3) Add back dividends received, deducted on return	(4) Plus or minus, except inc. or non-deductible expense	(5) Minus capital loss (based on COST) in excess of \$1,000.00	(6) Actual earnings and profits	(7) (Memo. of capital losses on books due to INFLATION over costs to stock- holders)
1925						
1926	(1,380.33)	3,968.50			2,588.17	
1927	(616.74)	11,830.54			11,213.80	
	Adj. 3,500.00				3,500.00	
1928	(279.85)	27,568.61			27,288.76	
1929	(47.50)	31,717.33			31,669.83	
	Adj. (7.08)				(7.08)	
1930	(53.10)	34,048.73			33,995.63	
	Adj. (13.43)				(13.43)	
1931	(12,218.09)	31,287.34			19,069.25	21,591.50
1932	(15,299.88)	16,726.22			1,426.34	1,149.13
1933	(16,085.55)	12,039.75			(4,045.80)	155,911.86

Computation of earnings and profits accumulated

(1) Year	(2) Net Income per return	(3) Add back dividends received, deducted on return	(4) Plus or minus, exempt inc. or non-deductible expense	(5) Minus capital-loss based on CEST, in excess of \$2,000.00	(6) Actual earnings and profits	(7) Memo of capital loss on books due to INFLATION over costs to stock- holders
1934	(2,273.49)	15,173.75		(10,784.85)	2,115.41	
1935	(2,902.51)	18,724.42	1,231.59	(15,918.53)	1,134.97	
	Adj. 1,924.10				1,924.10	
1936	31,281.07		(3.09)	(796.98)	30,421.00	
1937	34,630.42		1.75	(36.84)	34,595.33	662.50
1938	17,158.42		(280.47)	(15.98)	16,901.97	
(to 11/30)						
Totals	37,316.46	203,085.19	929.78	(27,553.18)	\$213,778.25	\$179,314.99
Less dividends paid:						
In 1936				\$30,465.41		
In 1937				34,469.67		
In 1938 (to 11/30)				16,917.95		
In 1938—a/c liquidation				111.84		
					81,964.87	
Balance of Accumulated Earnings and Profits					\$131,813.38	

Note: See next sheet for reconciliation of \$131,813.38 accumulated earnings and profits, as computed above, with books of the John H. Wheeler Company.

Commissioner of Internal Revenue

19
11

Page No. 3

JOHN H. WHEELER CO.

Reconciliation of accumulated earnings and profits with books
of the John H. Wheeler Company—November 30, 1938

Capital losses on corporation's books due to Inflation
over cost to stockholders of certain securities
turned in by said stockholders for which they re-
ceived shares of stock of the John H. Wheeler Co.
based on the fair market value, when turned in,
of said certain securities. (See column 7 above)...\$179,314.99

Deficit Account on books of the John H. Wheeler
Co. (This deficit account has been charged with
the above inflated losses of \$179,314.99)..... 47,501.61

Elimination of the inflated charges of \$179,314.99
from the deficit account results in a surplus of...\$131,813.38

Note: Some of the items in the above computations are sub-
ject to verification and change. It appears, however, that any
changes made will be relatively nominal. [16]

EXHIBIT "C"

Page No. 1

Treasury Department
Internal Revenue Service
San Francisco, Calif.

Office of:
Int. Rev. Agent in Charge
San Francisco Division

September 4, 1940

John H. Wheeler (Decedent)
Rollo C. Wheeler, Executor of Estate
c/o Vincent H. O'Donnell
1820 Mills Tower
San Francisco, California

I enclose a copy of the report of the examina-

tion of your income tax returns for the years shown below. After consideration by this office, the following adjustment of your tax liability appears to be warranted; for the reasons stated in the report:

Year, 1938°

Deficiency \$30,695.00

If You Agree to this adjustment, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Such interest will cease 30 days after the receipt of the executed form, or upon the payment of the additional tax to the collector, whichever occurs first.

If you desire to make immediate payment of the additional tax without awaiting assessment, you should forward your remittance to the Collector of Internal Revenue at 235 Federal Office Building, San Francisco, enclosing this letter, or a copy thereof. Interest on the additional tax should be included in your remittance, computed at the rate of 6 percent per annum from the due date of the first installment to the date of payment.

If You Do Not Agree to the proposed adjustment, you may file a protest, executed in triplicate under oath, with this office, within 30 days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration, and, if you so request, an opportunity for a hearing in this office, will be granted you prior to final determination of any deficiency

against you. This letter is not a final notice of deficiency, and this office will be pleased to answer any questions which may occur to you in your examination of the enclosed copy of the report.

Should you fail to pay the additional tax to the collector of internal revenue or to file with this office within the 30-day period mentioned either a waiver on the enclosed form or a written protest, final determination of your tax liability will be made and a notice of deficiency will be sent you in accordance with the provisions of law applicable to the assessment and collection of income- and profits-tax deficiencies.

Your prompt acknowledgment of the receipt of this letter and related papers upon the enclosed form will be much appreciated.

Respectfully,
(F. M. HARLESS)

Internal Revenue Agent in
Charge.

Enclosures:

Report of examination.

Form of waiver.

Form of acknowledgement. [17]

Page No. 2

Taxpayer:
John H. Wheeler
(Decedent)

Examining Officer:
Jacob Goldberg

Preliminary Statement**Table of Contents****Schedule No. 1 Block Adjustments****No. 1A Explanation of Items****No. 2 Computation of Tax****No. 2A Computation of Alternative Tax****Exhibit "A"** Computation of amount taxable as Dividends a/c liquidation of John H. Wheeler Co.

Principal changes in income as reported: Increase in dividend income; increase in farming income; disallowance of personal expense deduction.

All changes were discussed with Rollo C. Wheeler, Executor of deceased taxpayer's estate.

Taxpayer's objections: Increase in dividend income account liquidation of John H. Wheeler Co.

Books kept on cash basis.

Status and reason for exemption: Married and living with wife, who filed a separate return and claimed no exemption.

Report on wife, Frances V. Wheeler, is concurrently submitted.

SCHEDULE No. 1**Block Adjustments**

	Return	Additions To Income	Corrected
2. Dividends	\$42,101.36	\$66,406.69	\$108,508.05
4. Interest	300.00		300.00
9. Farming	8,351.68	238.02	8,589.70
10. (b) L. T. Cap. Loss (2,141.77)			(2,141.77)
12. Total Income	<u>\$48,611.27</u>		<u>\$115,255.98</u>

	Return	Additions To Income	Corrected
14. Interest	1,666.66		1,666.66
15. Taxes	4,359.71		4,359.71
18. Other Deductions,...	8,505.64	2,700.00	5,805.64
19. Total Deductions	\$14,532.01		11,832.01
20. Net Income	\$34,079.26	\$69,344.71	\$103,423.97

SCHEDULE NO. 1A

Explanation of Items

Item 2: Taxpayer owned 2459 shares of stock of the John H. Wheeler Co. which he acquired prior to December 31, 1929 in exchange (nontaxable) for securities which cost him \$152,342.24. The stockholders of the John H. Wheeler Co. elected to liquidate the Corporation during the month of December, 1938, under the provisions of Section 112(b)(7) of the Revenue Act of 1938. Taxpayer, a "qualified electing shareholder", executed and filed Form 964 whereby he elected to be taxed under the provisions of Section 112(b)(7)(E) of the Revenue Act of 1938. [18]

Page No. 3

Schedule No. 1A (Continued)

Amount taxable as dividends, as provided by Section 112(b)(7)(E)(i) of the Revenue Act of 1938, per Ex. "A" of this report	\$66,406.69
Amount reported as dividends on tax return.....	None
Adjustment: Addition to Income	\$66,406.69

(See item 10(b), below, for the computation of long-term capital gain under the provisions of Section 112(b)(7)(ii) of the Revenue Act of 1938)

Item 9: Taxpayer reported income on a cash basis. He apparently did not report as income when received, certificates issued by the California Prune and Apricot Growers Association. Some of these certificates were cashed in 1938, when taxpayer received \$238.02. Said \$238.02 is added to his taxable income for 1938.

Item 10(b): Re: Liquidation of John H. Wheeler Co.

Computation of long-term capital gain under the provisions of Section 112(b)(7)(E)(ii) of the Revenue Act of 1938:

Property received in liquidation 12/2/38:

Securities acquired prior to 4/9/38.....	\$311,933.06
Securities acquired after 4/9/38.....	346.94
<hr/>	
Total securities, at fair market value, 12/2/38.....	\$312,280.00
Cash Received	55.92
<hr/>	
Total received on liquidation	\$312,335.92
Taxpayer's basis of 2459 shares of stock of John H. Wheeler Co.	150,158.07
<hr/>	
Gain on liquidation	\$159,177.85
Taxable as a dividend, per Exhibit A.....	66,406.69
<hr/>	
Balance of Gain	\$ 92,771.16
<hr/>	

The \$92,771.16 balance of gain is recognized to the following extent:

Cash received	55.92
Securities acquired by corporation after 4/9/38.....	346.94
<hr/>	

Long-Term Capital Gain (on Securities held for more than 24 months)\$ 402.86
Long term capital gain of \$402.86 was correctly reported on the tax return.

The basis of the securities (having a fair market value on December 2, 1938 of \$312,280.00) received in liquidation of the John H. Wheeler Co. is computed as follows, under the provisions of Section 113(a)(18) of the Revenue Act of 1938: [19]

Page No. 4

Schedule No. 1A—(Continued)

Basis of taxpayer's 2459 shares of stock of the John H. Wheeler Co.	\$153,158.07
Less: Cash received on liquidation	55.92
Remainder	\$153,102.15
Plus: Gain recognized as follows:	
Taxable as a dividend	\$ 66,406.69
Taxable as a long-term capital gain	402.86
Basis of securities acquired 12/2/38	\$219,911.70

Item 18: Included in other deductions was \$3,708.09 legal expense. Said \$3,708.09 included \$2,700.00 paid (\$1,350.00 each to Vincent H. O'Donnell and John D. Brethauer) for legal fees in contesting a substantial alleged deficiency against taxpayer for a 1935 gift tax. The giving of a gift is a personal transaction. All expenses arising out of said gift are personal expenses which are not deductible, as provided in Section 24(a)(1) of the Revenue Act of 1938. Deduction of \$2,700.00 is accordingly disallowed.

SCHEDULE No. 2

1. Net income (from Schedule 1)	\$103,423.97
2. Less: Personal Exemption	2,500.00
4. Balance (surtax net income)	\$100,923.97
6. Earned income credit	300.00
7. Balance subject to normal tax	\$100,623.97
8. Normal tax at 4 percent	\$ 4,024.96
9. Surtax on Item 4	30,535.90
10. Total tax	34,560.86
(b) Total tax (alternative tax in case of a net long-term gain or loss) (from Schedule 2-A)	35,246.23
13. Total tax assessable	\$ 35,246.23
14. Tax previously assessed	4,551.23
15. Additional tax to be assessed	\$ 30,695.00

[20]

Page No. 5

SCHEDULE No. 2-A

Computation of Alternative Tax

1. Net Income (from Schedule 1)	\$103,423.97
Plus: Net Long-Term Loss	2,141.77
Ordinary net income	\$105,565.74
2. Less: Personal exemption	2,500.00
4. Balance (surtax net income)	\$103,065.74
6. Earned income credit	300.00
7. Balance subject to normal tax	\$102,765.74
8. Normal tax at 4 per cent	\$ 4,110.63
9. Surtax on Item 4	31,778.13
10. Partial tax	\$ 35,888.76
Minus: 30% of net long-term loss	642.53
11. Alternative Tax	\$ 35,246.23

EXHIBIT "A"

Computation of amount Taxable as Dividends, under the Provisions 112(b)(7)(E)(i) of the Revenue Act of 1938

Prior to 12/31/29 John H. Wheeler and his wife turned in securities for which they received in exchange 4918 shares of stock of the John H. Wheeler Co.; par value	\$491,800.00
(on the records of the corporation Securities a/c was debited with \$491,800.00 and Capital Stock issued a/c credited with \$491,800.00)	
The securities which were turn-in cost taxpayer and his wife (each equally)	\$304,684.49
Excess of values set up on Corp. books over transferor's cost	\$187,115.51
Deficit, as of 12/31/38, per corporation's books	47,501.61
Surplus, as of 12/31/38, based on transferor's cost	\$139,613.90
Less: Excess of corporation's book value over transferor's cost of unsold securities at liquidation of corporation in December, 1938	\$ 6,800.52
Accumulated earnings and profits of the corporation, as of December 31, 1938, applicable to 4918 shares of stock	\$132,813.38
Taxpayer's ratable share, applicable to his 2459 shares of stock:	
50% of \$132,813.38	\$ 66,406.69

[Endorsed]: U. S. B. T. A. Filed May 12, 1941.

[21]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J.

P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4-a to f, inclusive. Denies that the Commissioner erred as alleged in subparagraphs a to f, inclusive, of paragraph 4 of the petition. [22]

5-a. Admits that the John H. Wheeler Co. was organized in 1925 by John H. Wheeler and his wife, Frances V. Wheeler; that securities with a cost of \$304,684.49 were exchanged for 4,918 shares of capital stock of John H. Wheeler Co.; that thereafter the company had a statutory income tax basis for its assets of \$304,684.49; denies the remaining allegations contained in subparagraph a of the paragraph of the petition designated 7.

5-b. Admits that in years subsequent to organization and prior to dissolution in 1938 upon sale of securities acquired upon organization the corporation used the cost of the securities to transferors as cost basis for income tax purposes; denies the remaining allegations contained in subparagraph b of the paragraph of the petition designated 7.

5-c. Denies the allegations contained in subpara-

graph e of the paragraph of the petition designated 7.

5-d. Admits that the corporation was dissolved on December 2, 1938, under the provisions of section 112(b)(7) of the Revenue Act of 1938; denies the remaining allegations in subparagraph d of the paragraph of the petition designated 7.

5-e. Admits that no taxable dividends were reported by the stockholders of the corporation upon its dissolution; denies the remaining allegations contained in subparagraph e of the paragraph of the petition designated 7.

5-f. For lack of materiality, denies the allegations contained in subparagraph f of the paragraph of the petition [23] designated 7.

5-g and h. Denies the allegations contained in subparagraphs g and h of the paragraph of the petition designated 7.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be sustained and the petitioners' appeal denied.

(Signed) J. P. WENCHEL
T. M. M.

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:**Alva C. Baird,****Division Counsel;****T. M. Mather,****Harry R. Horrow,****Special Attorneys,****Bureau of Internal Revenue.****HRH :sob 7/2/41****[Endorsed]: U.S.B.T.A. Filed July 8, 1941. [24]****United States Board of Tax Appeals****Docket No. 107255****Docket No. 107258****Docket No. 107260****Docket No. 107263****Docket No. 107265****ESTATE OF JOHN H. WHEELER, DE-
CEASED****CORNELIA W. GOOD****ELLIOTT H. WHEELER****FRANCES V. WHEELER****YSABEL F. BERLINER****Petitioners,****v.****COMMISSIONER OF INTERNAL REVENUE,
Respondent.****STIPULATION OF FACTS****It Is Hereby Stipulated by and between the
parties hereto through their respective attorneys**

that the following facts shall be taken to be true in the above-entitled proceedings and received as evidence therein subject to the right of either party to offer such further and additional evidence not inconsistent with or contrary to the facts herein stipulated:

1. The petitioners in Docket No. 107255 are the duly appointed, qualified and acting executors of the last will and testament of John H. Wheeler, deceased. The petitioners in Docket Nos. 107258, 107260, 107263, and 107265 are Cornelia W. Good, Elliott H. Wheeler, Frances V. Wheeler, and Isabel F. Berliner, respectively. The said decedent John H. Wheeler, [25] with Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good, Isabel F. Berliner and Rollo C. Wheeler (who is not involved in any of these proceedings) constituted all of the stockholders of John H. Wheeler Company on December 2, 1938. On said date said persons owned the following shares of the capital stock of said corporation:

Stockholder	No. of Shares
John H. Wheeler	2,459
Frances V. Wheeler	491.8
Elliott H. Wheeler	491.8
Cornelia W. Good	491.8
Isabel F. Berliner	491.8
Rollo C. Wheeler	491.8
Total.....	4,918.0

2. John H. Wheeler Company was organized as a corporation under the laws of the State of California in the year 1925 by said John H.

Wheeler and Frances V. Wheeler, his wife. In the years following the organization of said company, and until the year 1929, said John H. Wheeler and Frances V. Wheeler transferred to said company securities having a cost to them of \$304,683.49, in exchange for 4,918 shares of the common capital stock of said company having a par value of \$100 per share, or an aggregate value of \$491,800. No gain or loss was recognized to said transferors or transferees for federal income tax purposes by reason of any of said exchanges. The stock in the new company was issued in accordance with an open permit from the [26] Commissioner of Corporations of the State of California, which authorized the issuance at par for cash of a total of 5,000 shares of the common capital stock of the new company, or in lieu thereof the same number of shares in exchange for listed securities if the listed securities had a fair market value on the date of the exchange of \$100 for each share of the capital stock of the new company which might be issued in exchange for them. On the dates of exchange, the securities transferred to John H. Wheeler Company for said 4,918 shares of its common capital stock had an aggregate fair market value of \$491,800. After the 4,918 shares of the common capital stock of John H. Wheeler Company had been issued, the basis of said securities in the hands of the John H. Wheeler Company for purposes of determining its federal income tax liability was \$304,684.49, but the basis of the securities shown on the books of said John H.

Wheeler Company at all times thereafter was \$491,800.

3. In computing the gain or loss realized for federal income tax purposes on the sale of the particular securities which it had acquired following its organization, John H. Wheeler Company used the cost basis of said securities to its transferors, John H. Wheeler and Frances V. Wheeler. In its books of account, said John H. Wheeler Company computed gain or loss on the sale of said particular [27] securities by using the fair market value of the securities which were transferred to the corporation by John H. Wheeler and Frances V. Wheeler as set forth above.

4. On November 30, 1938, the books of account of the John H. Wheeler Company were closed and they showed a deficit of \$47,501.61. This deficit was caused principally by losses on the sale of securities acquired by the corporation following its organization computed on the basis of the fair market value of said securities at the time that they were transferred to the John H. Wheeler Company. As of the same date the difference between the cost of said securities to the said transferors and the fair market value as of the date of the transfer to the corporation was \$180,314.99. In arriving at the deficiencies involved in these proceedings, the respondent determined that the accumulated earnings and profits of the John H. Wheeler Company as of December 2, 1938, amounted to \$132,813.38. In computing said earn-

ings and profits, respondent subtracted the said deficit of \$47,501.61 as shown on the books of John H. Wheeler Company from said sum of \$180,314.99, which respondent had computed as aforesaid.

5. After giving consideration to the application of Section 112 (b) (7) of the Revenue Act of 1938, the stockholders of the John H. Wheeler Company dissolved said corporation on December 2, 1938, and all of its assets, consisting of securities having a fair market value of \$624,560 and cash in the sum of \$111.84, were distributed in liquidation during the month of December, 1938, proportionately to the stockholders of said company.

6. The fair market value of the assets received by the stockholders of John H. Wheeler Company in said liquidation as of December 2, 1938, were as follows:

John H. Wheeler	\$312,335.92
Frances V. Wheeler	62,467.18
Elliott H. Wheeler	62,467.18
Cornelia W. Good	62,467.18
Ysabel F. Berliner	62,467.18
Rollo C. Wheeler	62,467.18

7. The basis of the stock of the John H. Wheeler Company to the said stockholders for federal income tax purposes at the time of liquidation was as follows:

John H. Wheeler	\$153,505.01
Frances V. Wheeler	30,701.00
Elliott H. Wheeler	30,701.00
Cornelia W. Good	30,701.00

Ysabel F. Berliner	30,701.00
Rollo C. Wheeler	30,701.00
	<hr/>
	\$305,610.01

8. Pursuant to the provisions of Section 112 (b) (7) of the Revenue Act of 1938, John H. Wheeler, Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good, and Ysabel F. Berliner [29] executed written elections on Form 964 to have recognized and taxed in accordance with Section 112 (b) (7) of the Revenue Act of 1938 the gains on the shares of the capital stock of the John H. Wheeler Company owned by them on December 2, 1938. John H. Wheeler, Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good, and Ysabel F. Berliner, in filing their federal income tax returns for the year 1938, reported as long-term capital gains their proportionate share of the securities acquired by the John H. Wheeler Company after April 9, 1938, and the cash which was distributed in liquidation as follows:

John H. Wheeler	\$402.86
Frances V. Wheeler	80.57
Elliott H. Wheeler	80.57
Cornelia W. Good	80.57
Ysabel F. Berliner	80.57

9. Said John H. Wheeler and the other petitioners herein did not report in their federal income tax returns for the year 1938 any dividends as having been received by them in connection with the liquidation of said John H. Wheeler Company, but did file said written elections on Form 964, or in accordance with Section 112 (b) (7) (E) of

the Revenue Act of 1938. Said John H. Wheeler died on June 14, 1939, and a deficiency in tax was asserted by the respondent on or about February 12, 1941, against the executors of his estate and each of the other petitioners in the following amounts: [30]

Estate of John H. Wheeler.....	\$30,695.00
Frances V. Wheeler	2,682.95
Elliott H. Wheeler	2,138.67
Cornelia W. Good	1,662.71
Ysabel F. Berliner	1,474.27

10. In arriving at the deficiencies involved in these proceedings, the respondent included in the net income of John H. Wheeler and each of the other petitioners for the year 1938 dividends representing their proportionate share of the accumulated earnings and profits of the company, and computed said earnings and profits in the manner outlined in paragraph 4 above. The amounts of the dividends which respondent determined were distributed by said company in liquidation under the provisions of Section 112 (b) (7) of the Revenue Act of 1938 are as follows:

John H. Wheeler	\$66,406.69
Frances V. Wheeler	13,281.38
Elliott H. Wheeler	13,281.38
Cornelia W. Good	13,281.38
Ysabel F. Berliner	13,281.38

The petitioners' computation of earnings and profits differs from that of respondent in that petitioners assert that the cost of the securities transferred to the John H. Wheeler Company in ex-

change for its capital stock was the fair market value thereof on the date of transfer to the company, without regard to the cost of said securities to the transferors. [31]

11. In arriving at the deficiencies asserted against the petitioners, the respondent did not reduce the accumulated earnings and profits determined to have been distributed to said stockholders by the amount of the deficiency in income tax of the John H. Wheeler Company for 1936 in the amount of \$5,953.06. The respondent has determined that the stockholders are liable for said deficiency as transferees of the assets of the John H. Wheeler Company, and the proceedings involving said transferees' liability are now pending before the Board of Tax Appeals as Docket Nos. 107256, 107257, 107259, 107261, 107262, and 107264.

12. No claim is made by the respondent that the proceedings taken by the John H. Wheeler Company and its stockholders to dissolve the John H. Wheeler Company and distribute its assets under Section 112 (b) (7) of the Revenue Act of 1938 were defective or incomplete.

Dated: This 27th day of March, 1942.

VINCENT H. O'DONNELL

Counsel for Petitioners

1820 Mills Tower

San Francisco, Calif.

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent [32]

**ORAL STIPULATION READ INTO THE
RECORD OF MARCH 28, 1942.**

Mr. O'Donnell: At this time I would like to offer in evidence a copy of a tax return for the year 1938, which reports the income taxes for the John H. Wheeler Company for the year 1938, and I will ask counsel for the Respondent to stipulate with me that this copy of the return for the year 1938, covering the income of the John H. Wheeler Company is true and correct, and an exact copy of the return, the original return being in the Respondent's possession.

Mr. Horrow: So stipulated.

The Clerk: Exhibit 1.

The Member: It will be received in evidence as Petitioners' Exhibit 1.

(The copy of income tax return, marked Petitioners' Exhibit No. 1, was received in evidence)

Mr. O'Donnell: So there will be no misunderstanding, the stipulation just made as to Exhibit No. 1 is understood to run to the first group of cases, that is, cases 107255, 107258, 107260, 107263 and 107265.

Any further stipulation will run to that group of cases unless counsel otherwise indicates.

Mr. Horrow: Correct.

Mr. L'Donnell: I now offer in evidence a copy of income tax return for the calendar year 1938, on Form 1120-H, for the John H. Wheeler Company, and offer to stipulate that this return is an

exact copy of the original return filed by the John H. Wheeler Company in March of 1939, and an exact copy of the original in the possession of [33] the Respondent.

Mr. Horrow: So stipulated.

The Clerk: Exhibit 2.

The Member: It will be received in evidence as Petitioners' Exhibit No. 2.

(The copy of income tax return, marked Petitioners' Exhibit No. 2, was received in evidence)

Mr. O'Donnell: That completes the evidence in this first group of cases.

Mr. Horrow: I think that completes the record, your Honor.

[Endorsed]: U.S.B.T.A. Filed 4-20-42. [34]

Treasury Department

FORM 201A

Internal Revenue Service

1938

UNITED STATES

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN 1938

For corporations having total receipts of not more than \$100,000 and a net income of not more than \$25,000, or for corporations having total receipts of not more than \$100,000 and a net income of not more than \$25,000, or for corporations having total receipts of not more than \$100,000 and a net income of not more than \$25,000.

For Calendar Year 1938

or fiscal year beginning

1938 and ending

1939 DUPLICATE COPY

IMPORTANT

One duplicate copy must be made









1914

Division of Fisheries

Bureau of Fisheries

Division of Fisheries

Bureau of Fisheries

QUESTIONS

Division of Fisheries

Bureau of Fisheries

Division of Fisheries

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QUESTIONS



Petitioners' Exhibit No. 1—(Continued)

John H. Wheeler Co.
St. Helena, California

INVESTMENTS IN STOCKS AND 1938
DIVIDENDS RECEIVED

Shares		Cost to Corporation	1938 Dividends
240	American Smelting & Ref.....	\$ 12,882.30	\$ 420.00
60	American Car & Foundry	1,432.50	
340	American Tel. & Tel. Co.....	37,519.60	3,033.00
10	Armour of Del. 7% Pfd.	870.00	105.00
50	Boeing Airplane	1,200.19	
500	Caterpillar Tractor Co. Com.....	18,465.93	1,018.75
100	Cerro de Pasco Copper Corp.....	6,112.50	400.00
900	Consol. Chem. Ind. "A"	20,560.00	1,357.50
90	Crown Zellerbach Pfd 5%.....	7,521.88	450.00
120	Crown Zellerbach Common	250.42	86.26
140	Douglas Aircraft Co.	6,846.10	420.00
20	Dow Chemical Co.	2,078.00	60.00
450	DuPont de Nemours & Co.....	34,670.28	791.00
30	Eastman Kodak Co. of N. J.....	4,895.65	195.00
410	Electric Bond & Share	5,117.98	
50	Fibreboard Products Prior Pfd.....	5,086.67	300.00
2540	General Electric Co.	50,348.70	1,780.80
800	General Motors Corp.	15,228.75	600.00
100	Goodyear Pfd. 5%	8,685.84	375.00
50	International Harvester Co.	2,825.00	107.50
700	Kennicott Copper Corp.	14,017.50	525.00
50	Loew's Inc. Pfd.	5,015.63	325.00
80	McKesson & Robbins Pfd. #3.....	1,309.41	168.75
30	Montgomery Ward & Co.....	1,445.80	52.50
300	National Auto Fibres "A"	2,501.94	
40	Ohio Oil Pfd. 6%	4,400.00	270.00
80	Owens Illinois Glass Co.....	5,608.66	126.00
50	Pacific Lighting Corp. Com.....	2,893.75	150.00
440	Paraffine Co's	14,498.78	667.50
110	Pure Oil Pfd. 6%	9,098.99	708.00
50	Pan American Airways	1,457.70	50.00
1000	Radio Corp. of America	4,825.00	
40	Sherwin Williams Co.	5,434.50	100.00
1820	Socony Vacuum Oil Co.	29,575.00	912.00
100	Standard Oil of Calif.	4,320.00	105.00

Petitioners' Exhibit No. 1—(Continued)

Shares		Cost to Corporation	1933 Dividends
450	Standard Oil of Indiana	12,150.00	337.50
20	Standard Oil of New Jersey	1,267.48	25.00
800	Texas Gulf Sulphur Co.	37,450.00	1,200.00
10	Tidewater Assoc. Pfd. 4½	142.50	63.00
200	United Aircraft Corp.	3,848.88	100.00
150	United Air Lines Transport	2,211.18	
100	U. S. Rubber 1st Pfd 8%	10,800.00	
100	U. S. Steel Corp.	8,304.98	
500	Westinghouse Elect & Mfg Co.	19,123.02	1,255.00
Total		\$444,588.39	\$18,640.00

[39]

Petitioners' Exhibit No. 1—(Continued)

JOHN H. WHEELER CO.
St. Helena, California

TAX RETURN SCHEDULE—YEAR 1938

Schedule "C"

Capital Gains & Losses

	Acquired	Sold	Sales Price	Cost	Gain
15 Sh Caterpillar		5-16-38	\$ 1,529.21	\$ 1,500.00	\$ 29.21
5 M U. S. Treas. Bonds		5-16-38	5,464.76	5,263.13	211.63
113 Sh Consol Chem "A"		6-14-38	2,652.57	2,260.00	392.57
6 Sh Consol Chem "A"		6-14-38	2.87		2.27
5 Sh Armour of Del 7%	1-1-23	11-18-38	514.37	495.70	18.67
2 Sh Dupont			288.75	154.10	134.65
4 Sh General Electric			175.00	79.48	95.72
5 Sh Montg. Ward			248.75	240.95	7.80
2 Sh Ohio Oil Pfd 6%			223.50	220.00	3.50
4 Sh Owens Ill Glass			283.00	280.44	2.56
5 Sh Paraffine Co's			290.62	164.75	125.87
8 Sh Pure Oil Pfd 6%			704.00	661.76	42.24
4 Sh Tidewater Oil Pfd	7-25-27		366.00	57.00	309.00
2 Sh Westinghouse			283.50	76.48	157.02

Total Gains.....

\$1,592.71

Petitioners' Exhibit No. 1—(Continued)

Tax Return Schedule—Year 1938—(Continued)

Schedule "C"					
Capital Gains & Losses		Acquired	Sold	Sales Price	Cost
10 Sh Consol Chem "A"	6-14-38			\$ 235.00	322.50
5 Sh Electric Bond	11-18-38			55.00	62.40
4 Sh Socony Vacuum				52.00	65.00
5 Sh Stand. Oil N. J.				280.62	316.90
Total Losses					\$ 164.18
Total				\$13,576.92	\$12,210.39
Plus unallowable deductions Sec. 24(b)					76.68
Total Taxable Capital Gain					\$ 1,445.21

Form 1120 A
Year 1938

[40]

Petitioners' Exhibit No. 1—(Continued)

JOHN H. WHEELER CO.

St. Helena, California

A corporate liquidation in December 1938 under Section 112(b)(7):

John H. Wheeler Co.

St. Helena, Calif.

Incorporated under laws of State of California, October 9, 1925.

Adopted a plan of complete liquidation on December 2, 1938 providing for a distribution in complete cancellation or redemption of all its stock, and for the transfer of all its property under the liquidation entirely within the month of December 1938.

Last income tax return was filed with the Collector of Internal Revenue at San Francisco for the year 1937.

Capital Stock outstanding on date of adoption of plan of liquidation, 4918 shares of common stock with one vote per share.

List of Shareholders on date of adoption of Plan:

John H. Wheeler	2459	Sh	#37	2459	Votes	50%
Francis V. Wheeler	491-4/5	Sh	36	491-4/5	Votes	10
Elliott H. Wheeler	491-4/5	Sh	30	491-4/5	Votes	10
Cornelia W. Good	491-4/5	Sh	32	491-4/5	Votes	10
Isabel F. Berliner	491-4/5	Sh	28	491-4/5	Votes	10
Rollo C. Wheeler	491-4/5	Sh	34	491-4/5	Votes	10
Total	4918	Sh		4918	Votes	100%

List of Shareholders on April 9, 1938:

Transfers

John H. Wheeler	2459	Sh	Var		
Frances V. Wheeler	459	Sh	Var	Plus	32-4/5
Elliott H. Wheeler	500	Sh	#24	Minus	8-1/5
Cornelia W. Good	500	Sh	#25	Minus	8-1/5
Isabel F. Berliner	500	Sh	#23	Minus	8-1/5
Rollo C. Wheeler	500	Sh	#26	Minus	8-1/5
Total	4918	Sh			

Elliott H. Wheeler, Cornelia W. Good, Isabel F. Berliner and Rollo C. Wheeler each transferred 8-1/5 shares to Frances V. Wheeler in order to give each of the shareholders involved an even 10% interest in John H. Wheeler Co. which would simplify the distribution of the assets of John H. Wheeler Co.

Petitioners' Exhibit No. 1—(Continued)

JOHN H. WHEELER CO.

St. Helena, California

DISTRIBUTION IN LIQUIDATION OF

JOHN H. WHEELER CO.

Securities acquired prior to April 9, 1938.....\$623,866.13

Securities acquired after April 9, 1938:

5 Sh Crown Zellerbach\$ 63.75

3 Sh American Tel & Tel..... 445.12

5 Sh McKesson & Robbins 185.00

693.87

Total Securities Distributed Dec. 2, 1938.....\$624,560.00

Cash Distributed 111.84

Total Distributed in liquidation.....\$624,671.84

Cost of John H. Wheeler Co. Stock to Shareholders:

1927 and prior..... 4278 Sh.....\$240,684.49

1929..... 640 Sh..... 64,000.00

1934 Taxable dividend not withdrawn 1,631.66

Total Cost of 4918 Sh @ 62.43.....\$306,316.15

Excess to shareholders on basis market
value over cost\$318,355.69

BASIS FOR DEFERRED GAIN:

Cost of stock redeemed\$306,316.15

Less Money received in liquidation..... 111.84

Remainder\$306,204.31

Plus gain recognized

On cash received\$111.84

On securities after Apr. 9, 1938..... 693.87

805.71

Basis of property acquired\$307,010.02

Apportioned to securities distributed

307,010.02 cost or basis

624,560.00 market equals 49156209 of market

Petitioners' Exhibit No. 1—(Continued)

Distributed to		Basis	Value	Excess
John H. Wheeler	50%	\$153,505.01	\$312,280.00	\$158,774.99
Francis V. Wheeler	10	30,701.00	62,456.00	31,755.00
Elliott H. Wheeler	10	30,701.00	62,456.00	31,755.00
Cornelia W. Good	10	30,701.00	62,456.00	31,755.00
Isabel F. Berliner	10	30,701.00	62,456.00	31,755.00
Rollo C. Wheeler	10	30,701.01	62,456.00	31,754.99
Total	100%	\$307,010.02	\$624,560.00	\$317,549.98

[42]

JOHN H. WHEELER CO.
St. Helena, California

STOCKS DISTRIBUTED IN LIQUIDATION

Shares		Dec. 3, 1938 Market Value	42152389 Basis to Shareholders
240	American Smelting	\$ 12,180.00	\$ 5,987.23
60	American Car & Foundry Co.....	1,710.00	840.57
340	American Tel & Tel.....	50,477.50	24,812.83
10	Armour of Del. 7% Pfd.....	1,025.00	503.85
50	Boeing Airplane	1,543.75	758.85
500	Caterpillar Tractor Co. Com.....	22,937.50	11,275.21
100	Cerro de Pasco Copper Corp.....	4,587.50	2,255.04
900	Consol. Chem. Ind. "A"	20,700.00	10,175.34
90	Crown Zellerbach Pfd. 5%.....	8,055.00	3,959.53
120	Crown Zellerbach Common	1,530.00	752.09
140	Douglas Aircraft Co.	9,572.50	4,705.48
20	Dow Chemical Co.	2,650.00	1,302.64
450	DuPont de Nemours & Co.....	65,081.25	31,991.48
30	Eastman Kodak Co. of New Jersey	5,362.50	2,636.00
410	Electric Bond & Share	4,151.25	2,040.60
50	Fibreboard Products Prior Pfd.	5,250.00	2,580.70
2540	General Electric Company	104,775.00	51,503.42
800	General Motors Corp.	38,400.00	18,875.98
100	Goodyear Pfd. 5%	10,100.00	4,964.78
50	International Harvester Co.....	2,968.75	1,459.32
700	Kennicott Copper Corp.	30,275.00	14,882.04
50	Loew's Inc. Pfd.	5,406.25	2,657.51
80	McKesson & Robbins Pfd \$3.....	2,960.00	1,455.02
30	Montgomery Ward & Co.....	1,451.25	713.38

Petitioners' Exhibit No. 1—(Continued)

Shares		Dec. 1, 1933 Market Value	49156289 Basic to Shareholders
300	National Auto-Fibres "A"	2,437.50	1,198.18
40	Ohio Oil Pfd. 6%	4,410.00	2,167.79
80	Owens Illinois Glass Co.	5,480.00	2,693.76
50	Pacific Lighting Corp. Common..	2,000.00	983.12
440	Paraffine Co's	24,860.00	12,220.23
110	Pure Oil Pfd 6%	9,460.00	4,650.18
50	Pan American Airways	868.75	427.04
1000	Radio Corp. of America	7,500.00	3,686.72
40	Sherwin Williams Co.	4,095.00	2,012.95
1820	Socony Vacuum Oil Co.	24,797.50	12,189.51
100	Standard Oil Co. of Calif.	2,687.50	1,321.07
450	Standard Oil Co. of Indiana	12,262.50	6,027.78
20	Standard Oil Co. of New Jersey	1,012.50	497.71
800	Texas Gulf Sulphur Co.	25,500.00	12,534.83
10	Tidewater Assoc. Pfd. 4½%	920.00	452.24
200	United Aircraft Corp.	7,400.00	3,637.56
150	United Air Lines Transport.	1,743.75	857.16
100	U. S. Rubber 1st Pfd. 8%	10,425.00	5,124.53
100	U. S. Steel Corp.	6,237.50	3,066.12
500	Westinghouse Electric Mfg. Co..	57,312.50	28,172.65
Total		\$624,560.00	\$307,010.02
		Per Share	62.4258

[Endorsed]: U.S.B.T.A. Filed Mar. 28, 1942.

[43].

Form 1120-11

Internal Revenue Service

UNITED STATES

1938 RETURN OF PERSONAL HOLDING COMPANY 1938

For Calendar Year 1938

DUPLICATE COPY

IMPORTANT

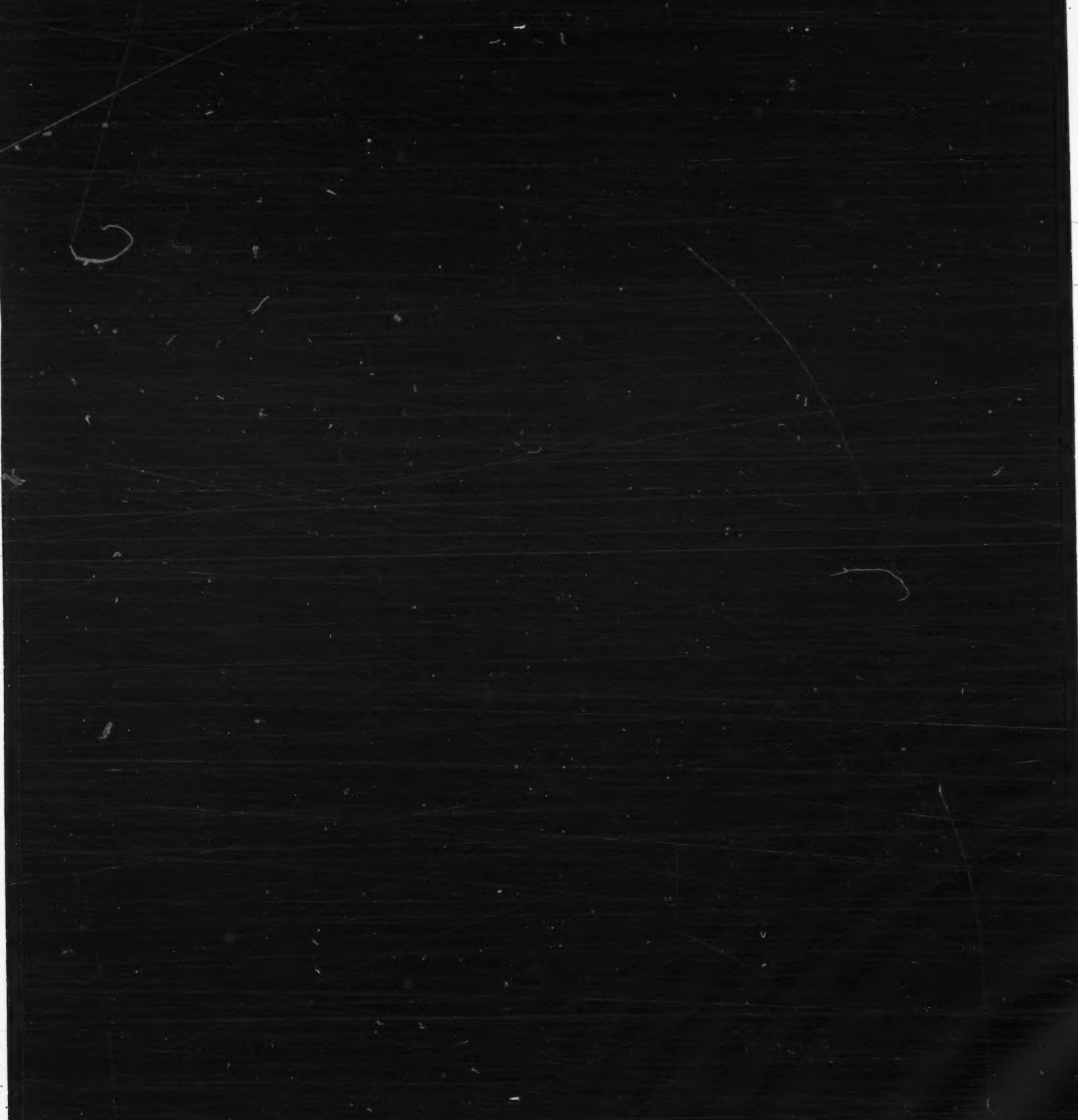
The duplicate copy must be
submitted with the original return.
If the original return is lost, the duplicate
copy must be submitted with the original return.



INSTRUCTIONS FOR FORM 1120H

UNITED STATES RETURN OF PERSONAL HOLDING COMPANY

GENERAL INSTRUCTIONS



SPECIFIC INSTRUCTIONS

The Tax Court of the United States

Docket Nos. 107255, 107258, 107260, 107263, 107265.

**ESTATE OF JOHN H. WHEELER, DE-
CEASED, ELLIOTT H. WHEELER AND
ROLLO C. WHEELER, EXECUTORS,**

'Petitioners, et al.,'¹

v.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

Promulgated February 24, 1943.

1. A personal holding corporation issued its outstanding stock in exchange for certain securities transferred to it by two of its stockholders. In 1938 its stockholders elected to liquidate under section 112 (b) (7) of the Revenue Act of 1938, under which, inter alia, that portion of the gain realized by each stockholder on liquidation not in excess of his ratable share of the earnings and profits of the corporation is recognizable and taxable as a dividend. In computing gain or loss for income tax purposes on the sale of such securities the corporation used its transferors' basis, but in computing earnings and profits as shown by its books of account and for the purpose of

¹Proceedings of the following petitioners are consolidated herewith: Cornelia W. Good; Elliott H. Wheeler; Frances V. Wheeler; and Ysabel F. Berliner.

section 112 (b) (7) it used as a basis the fair market value of the securities at the time of exchange. The respondent used the transferors' basis, as provided in section 501 (a), Second Revenue Act of 1940, in computing earnings and profits under section 112 (b) (7), 1938 Act. Held, that the provisions of said section 501 (a) are applicable and respondent's determination is approved.

2. Section 501 (a), Second Revenue Act of 1940, applied to a liquidation completed in 1938, is not violative of the Fifth Amendment of the Federal Constitution as being confiscatory in effect.

3. In computing earnings and profits a 1936 surtax on undistributed profits is deductible, notwithstanding the corporation used the cash basis and the tax was not paid in 1936. *H. M. Alworth Trust*, 46 B. T. A. 1045, followed.

Vincent H. O'Donnell, Esq., for the petitioners.
Harry R. Horrow, Esq., for the respondent.

OPINION.

Arnold, Judge: These consolidated proceedings involve deficiencies in income tax for the year 1938 as follows:

Docket No. 107255.....	\$30,695.00
Docket No. 107258.....	1,662.71
Docket No. 107260.....	2,138.67
Docket No. 107263.....	2,682.95

The questions involved are (1) whether the respondent erred in applying the provisions of section 501 (a) of the Second Revenue Act of 1940 in computing "earnings and profits" distributed in liquidation by the John H. Wheeler Co. to its stockholders under section 112 (b) (7) of the Revenue Act of 1938, (2) whether section 501 (a) of the Second Revenue Act of 1940 so applied is constitutional, and (3) whether respondent erred in failing to reduce the amount of earnings and profits determined by him by \$5,953.06, the amount of the deficiency in surtax on undistributed profits for 1936 determined by the respondent against the John H. Wheeler Co. The proceedings were submitted upon a stipulation of facts and two exhibits. The facts as stipulated are adopted as our findings of fact. We state herein only such as are deemed necessary to an understanding of the issues involved.

The petitioners, Elliott H. Wheeler and Rollo C. Wheeler, in Docket No. 107255 are the duly appointed and acting executors of the last will and testament of John H. Wheeler, who died on June 14, 1939, hereinafter referred to as the decedent. All returns involved herein were filed with the collector of internal revenue for the first district of California. On December 2, 1938, the decedent, Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good, Ysabel F. Berliner, and Rollo C. Wheeler (the latter not being involved in any of these proceedings) were the holders of all of the outstanding shares of the stock of the John H. Wheeler Co.,

hereinafter referred to as the Wheeler Co., as follows:

Shares held		Shares held	
John H. Wheeler.....	2,459	Ysabel F. Berliner.....	491.8
Frances V. Wheeler.....	491.8	Rollo C. Wheeler	491.8
Elliott H. Wheeler.....	491.8		
Cornelia W. Good.....	491.8	Total.....	4,918.0

The Wheeler Co. was organized as a corporation under the laws of the State of California in 1925 by the decedent and his wife, Frances V. Wheeler. In the years following its organization and until 1929 the decedent and his wife transferred to the company securities having a cost to them of \$304,683.49, in exchange for 4,918 shares of the common capital stock of the company having a par value of \$100 a share, or an aggregate par value of \$491,800. No gain or loss was recognized to the transferors or transferees for Federal income tax purposes by reason of any of such exchanges. On the dates of exchange, the securities transferred to the Wheeler Co. for the 4,918 shares of its common stock had an aggregate fair market value of \$491,800. The basis of the securities for the purpose of determining the Federal income tax liability of the Wheeler Co. was \$304,684.49, but the basis of the securities set up and entered on the books of account of the company was \$491,800. [49]

In computing the gain or loss realized on sales by the Wheeler Co. of the above securities for Federal income tax purposes the Wheeler Co. used the cost basis of the securities to its transferors, the decedent and his wife. In computing the gain or loss on sales

by the Wheeler Co. of such securities, as shown by its books of account and as reflected in its earnings and profits account, the Wheeler Co. used the fair market value of the securities as of the dates of transfer to it. On November 30, 1938, the books of account of the Wheeler Co. were closed and showed a deficit of \$47,501.61. This deficit was caused principally by losses on sales by the Wheeler Co. of securities transferred by decedent and his wife to the company, computed on the basis of their book or fair market value at the time of their transfer to the Wheeler Co. by decedent and his wife.

After giving consideration to the application of section 112 (b) (7) of the Revenue Act of 1938,²

²SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) Exchanges Solely in Kind.—

(7) Election as to Recognition of Gain in Certain Corporate Liquidations.—

(A) General Rule.—In the case of property distributed in complete liquidation of a domestic corporation, if—

(i) the liquidation is made in pursuance of a plan of liquidation adopted after the date of the enactment of this Act, whether the taxable year of the corporation began on, before, or after January 1, 1938; and

(ii) the distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within the month of December, 1938—

then in the case of each qualified electing shareholder (as defined in subparagraph (C)) gain upon the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized

the Wheeler Co. was dissolved on December 2, 1938, and all of its assets, consisting of securities having a fair market value of \$624,560 and cash in the sum of \$111.84, were distributed in liquidation, during December 1938, proportionately to the stockholders of the company. At the time of dissolution substantially all the securities originally acquired from John H. Wheeler and Frances V. Wheeler had been sold by the Wheeler Co. The fair market value of the assets of the Wheeler Co. received by its stockholders in liquidation as of December 2, 1938, and

only to the extent provided in subparagraphs (E) and (F).

.

(C) **Qualified Electing Shareholders.**—The term “qualified electing shareholder” means a shareholder (other than an excluded corporation) of any class of stock (whether or not entitled to vote on the adoption of the plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subparagraph (A) has been made and filed in accordance with subparagraph (D), but—

(i) in the case of a shareholder other than a corporation, only if written elections have been so filed by shareholders (other than corporations) who at the time of the adoption of the plan of liquidation are owners of stock possessing at least 80 percentum of the total combined voting power (exclusive of voting power possessed by stock owned by corporations) of all classes of stock entitled to vote on the adoption of such plan of liquidation; or

.

(D) **Making and Filing of Elections.**—The written elections referred to in subparagraph (C) must be made and filed in such manner as to be not in

the basis of the stock of the Wheeler Co. to each stockholder for Federal income tax purposes at the time of liquidation are as follows:

Stockholders	Fair market value as of Dec. 2, 1938	Basis of Wheeler Co. stock
John H. Wheeler	\$312,335.92	\$153,505.01
Frances V. Wheeler	62,467.18	30,701.00
Elliott H. Wheeler	62,467.18	30,701.00
Cornelia W. Good	62,467.18	30,701.00
Ysabel F. Berliner	62,467.18	30,701.00
Rollo C. Wheeler	62,467.18	30,701.00

[50]

Pursuant to the provisions of section 112 (b) (7)

contravention of regulations prescribed by the Commissioner with the approval of the Secretary. The filing must be within thirty days after the adoption of the plan of liquidation, and may be by the liquidating corporation or by the shareholder.

(E) **Noncorporate Shareholders.**—In the case of a qualified electing shareholder other than a corporation—

(i) There shall be recognized, and taxed as a dividend, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, 1913, such earnings and profits to be determined as of December 31, 1938, but without diminution by reason of distributions made during the month of December, 1938; and

(ii) There shall be recognized, and taxed as a short-term or long-term capital gain, as the case may be, so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after April 9, 1938, exceeds his ratable share of such earnings and profits.

the decedent and other petitioners herein executed written elections on Form 964 to have the gains on the shares of stock of the Wheeler Co. owned by them on December 2, 1938, recognized and taxed in accordance with section 112 (b) (7).

The decedent and other petitioners herein each reported as a long term capital gain in their respective 1938 Federal income tax returns only the value of their proportionate share of the securities acquired by the Wheeler Co., after April 9, 1938, and the proportionate amount of cash which was distributed in liquidation to each as follows:

John H. Wheeler	\$402.86
Frances V. Wheeler	80.57
Elliott H. Wheeler	80.57
Cornelia W. Good	80.57
Ysabel F. Berliner	80.57

The respondent determined that the Wheeler Co. had accumulated earnings and profits of \$132,813.38 as of December 2, 1938, and that the gain realized by each petitioner was recognizable in addition to the amount reported to the extent of his ratable share thereof under section 112 (b) (7) as follows:

John H. Wheeler	\$66,406.69
Frances V. Wheeler	13,281.38
Elliott H. Wheeler	13,281.38
Cornelia W. Good	13,281.38
Ysabel F. Berliner	13,281.38

[51]

The amount of accumulated earnings and profits of the Wheeler Co. was determined by the respondent as follows:—

Fair market value of 4,918 shares of Wheeler Co. stock or fair market value of securities exchanged therefor, set up on corporate books as cost of securities	\$491,800.00
Cost of securities to decedent and wife transferred by them to Wheeler Co. for its stock.....	304,684.49
Excess of corporate book value over transferors' cost	187,115.51
Less deficit on corporate books as of December 31, 1938	47,501.61
Surplus as of December 31, 1938 based on transferors' cost	139,613.90
Less excess of book value over transferors' cost of securities unsold at liquidation of Wheeler Co.....	6,800.52
Accumulated earnings and profits as of December 31, 1938 available for distribution to 4,918 shares of stock	132,813.38

The petitioners' computation of earnings and profits of Wheeler Co. differs from that of respondent in that petitioners assert that the cost to the company of the securities transferred to it in exchange for its 4,918 shares of stock is the fair market value of the securities on the date of transfer, and not the cost of the securities to the transferors as used by respondent in his computation of the deficiencies.

In the income tax return of the Wheeler Co. for 1938 it is stated that the return was made on the basis of cash receipts and disbursements.

Section 112 (b) (7) (E) (i) provides that upon complete liquidation of a domestic corporation under subsection (7) there shall be recognized and taxed as a dividend to the noncorporate shareholders the ratable share of the "earnings and profits"

of the corporation accumulated after February 28, 1913. The respondent contends that the "earnings and profits" distributed in liquidation by the Wheeler Co. and taxable to petitioners as dividends should be computed by applying the provisions of section 501 (a) of the Second Revenue Act of 1940, which so far as applicable herein is set forth in the margin.³ [52]

³SEC. 501. EARNINGS AND PROFITS OF CORPORATIONS.

(a) Under Internal Revenue Code.—Section 115 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(1) **Effect on Earnings and Profits of Gain or Loss and of Receipt of Tax-Free Distributions.**—The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

"(1) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain.

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis

The petitioners contend that the "earnings and profits" of the Wheeler Co. for the purposes of section 112 (b) (7) should be computed in accordance with the rules established by decisions of the courts and the Board which hold that "taxable income" is not the equivalent of "earnings and profits," and that on the disposition by a corporation of property acquired by it in exchange for its stock in a transaction wherein gain is not recognizable for the purposes of computing "taxable income," the basis of such property to the corporation for the purpose of determining "earnings and profits" available for the distribution of dividends is the cost of the property to the corporation or its fair market value at the time of the exchange, although the basis for the determination of taxable income on the same trans-

used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. * * *"

• • • • •

▲ (b) **Effective Date of Amendment.**—The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(c) **Under Prior Acts.**—For the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment. Nothing in this subsection shall affect the tax liability of any taxpayer for any year which, on September 20, 1940, was pending before, or was theretofore determined by, the Board of Tax Appeals, or any court of the United States.

action is cost to the transferor of the property. In support of this contention petitioners cite Charles F. Ayer, 12 B. T. A. 284; Ida I. McKinney, 32 B. T. A. 450; *affd.*, 87 Fed. (2d) 811; Susan T. Freshman, 33 B. T. A. 394; R. M. Weyerhaeuser, 33 B. T. A. 594; Robert R. McCormick, Executor, 33 B. T. A. 1046; Helen Sperry Lea, 35 B. T. A. 243 (reversed 96 Fed. (2d) 55, on the ground that transaction was a nontaxable reorganization under section 112 (i) (1) (B) (g), Revenue Act of 1938); F. J. Young Corporation, 35 B. T. A. 860; *affd.*, Fed. (2d) 137; W. S. Farish & Co., 38 B. T. A. 150; *affd.*, 104 Fed. (2d) 833; W. & K. Holding Co., 38 B. T. A. 830; A. & J., Inc., 38 B. T. A. 1248; and Dorothy Whitney Elmhirst, 41 B. T. A. 348. The petitioners further contend that section 501 of the Second Revenue Act of 1940, if properly construed, is not applicable to voluntary liquidation and dissolution of a corporation commenced and completed in 1938, but if it is construed to be applicable to a liquidation completed in 1938, such construction violates the rule of "permissible retroactivity" and that therefore section 501 is unconstitutional as in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. [53]

The respondent contends that, while some of the decisions cited by petitioners had been handed down prior to the liquidation of the Wheeler Co., nevertheless there had been no final adjudication of the proper basis to be used in determining the earnings and profits of a corporation; that article 115-3 of

Regulations 101,⁴ promulgated under the Revenue Act of 1938, providing that gains or losses should be brought into earnings and profits at the time and to the extent that gains and losses are recognized under the provisions of section 112 or corresponding provisions of prior acts, gave notice to the taxpayers that the Commissioner maintained his position despite the decisions of the Board and the Circuit Courts; that Congress resolved the question by enacting section 501 of the Second Revenue Act of 1940; and that its applicability to the Revenue Act of 1938 is not unconstitutional.

Art. 115-3. Earnings or Profits.—In determining the amount of earnings or profits (whether of the taxable year, or accumulated since February 28, 1913, or accumulated prior to March 1, 1913) due consideration must be given to the facts, and mere bookkeeping entries increasing or decreasing surplus will not be conclusive. Among the items entering into the computation of corporate earnings or profits for a particular period are all income exempted by statute, income not taxable by the Federal Government under the Constitution, as well as all items includible in gross income under section 22 (a) of the Act or corresponding provisions of prior Acts. Gains and losses within the purview of section 112 or corresponding provisions of prior Acts are brought into the earnings and profits at the time and to the extent such gains and losses are recognized under that section. Interest on State bonds and certain other obligations, although not taxable when received by a corporation, is taxable to the same extent as other dividends when distributed to shareholders in the form of dividends.

[Similar provisions are contained in art. 115-3, Regulations 101, 1938 Act, and Regulations 94, 1936 Act, and art. 115-1, Regulations 86, 1934 Act.]

Section 501 of the Second Revenue Act of 1940 is a complete answer to petitioners' contention as to what constitutes earnings and profits of a corporation in liquidation if it is applicable to the liquidation here in 1938 and is not in violation of the due process clause of the Fifth Amendment to the Constitution.

That Congress clearly intended the section to apply to transactions in prior years admits of no doubt. Subsection (c) thereof specifically provides that "for the purposes of the Revenue Act of 1938 or any prior Revenue Act the amendments made to the Internal Revenue Code by subsection (a) of this section shall be effective as if they were a part of each such Revenue Act on the date of its enactment." There is no ambiguity in this respect. This language must be given effect in determining Congressional intent. The petitions herein were filed after September 20, 1940.

It then remains to be determined whether the amendment, applied to the liquidation in question, is in violation of the due process clause of the Fifth Amendment to the Constitution, because of its retroactive provisions. If not, then respondent's determination must be approved.

Retroactivity alone of a taxing statute is not sufficient to bring the [54] law into conflict with the Federal Constitution. *Welch v. Henry*, 305 U. S. 134; *United States v. Hudson*, 299 U. S. 498; *Cooper v. United States*, 280 U. S. 409; *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1. In the latter case the Supreme Court held that the due process of law

clause is not a limitation upon the taxing power conferred upon Congress by the Constitution, unless, under a seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it is a confiscation of property rather than the levying of a tax, or so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion.

Petitioners cite and strongly rely upon *Nichols v. Coolidge*, 274 U. S. 531; *Blodgett v. Holden*, 275 U. S. 142; and *Untermeyer v. Anderson*, 276 U. S. 440, in support of their contention that the application of section 501 (a), Second Revenue Act of 1940, is arbitrary, capricious, and amounts to confiscation and therefore offends the Fifth Amendment. These cases involve gifts made prior to the enactment of the statute which sought to tax them. It was held that, as the gifts were voluntary acts not subject to tax when made and might not have been made otherwise, to tax them under a retroactive statute was violative of the Fifth Amendment. The facts here do not justify the conclusion there reached.

The liquidation of the Wheeler Co. in 1938 was not prompted by motives of unselfishness and generosity as in the case of gifts, but, in the face of mounting surtaxes on personal holding companies, it was advisable from a tax standpoint to liquidate, as will be hereinafter pointed out.

Neither is the fact that the liquidation of the Wheeler Co. was completed in 1938 prior to the en-

actment of section 501 (a) of the Second Revenue Act of 1940 sufficient to make invalid the application of the provisions thereof to the 1938 Act. It is necessary to consider the nature of the tax and the transactions involved. *Milliken v. United States*, 283 U. S. 15. In that case it was held that a statute imposing an estate transfer tax was not unconstitutional as applied to gifts in contemplation of death made before the enactment of such statute and during the existence of a prior act imposing lower rates.

The Wheeler Co. was a personal holding company, the type of corporation referred to as an "incorporated pocketbook" and "the most prevalent form of tax avoidance practiced by individuals with large incomes." Report No. 704 from Committee on Ways and Means, 73d Cong., 2d sess., p. 11. Under the Revenue Act of 1932 a corporation was required to pay a tax of $13\frac{3}{4}$ percent of its net income (sec. 13), whereas an individual was required to pay, in addition to a normal tax of 4 percent on the first \$4,000 net income and 8 [55] percent on the excess above \$4,000, a surtax ranging from 1 percent upon the first \$4,000 in excess of \$6,000 to 55 percent upon the net income in excess of \$1,000,000. Secs. 11 and 12. As pointed out in the above report, an individual receiving \$1,000.00 annual income from taxable bonds was subject under the then existing law to a tax of \$571,100. However, if he had formed a corporation and turned such bonds over to the corporation the only tax payable would be a tax of \$137,500 as long as no distribution of dividends was made by the corporation. Thus the formation of a corpora-

tion for the purpose of holding the securities and the retention by it of the income therefrom effected a tax saving to the individual of \$433,600. In the Revenue Act of 1934, Congress for the first time imposed a surtax of 30 percent upon the undistributed adjusted net income of every personal holding company as defined therein not in excess of \$100,000, plus 40 percent thereof in excess of \$100,000. Sec. 351. In section 109 of the Revenue Act of 1935 the rates provided for in section 351 of the 1934 Act were changed and ranged from 20 percent of the undistributed adjusted net income not in excess of \$2,000 to 60 percent of such income in excess of \$1,000,000. The rates were changed again in the Revenue Act of 1936. The surtaxes thus imposed were however ineffective to eliminate tax avoidance by means of a holding company. Report No. 1546, Committee on Ways and Means, 75th Cong., 1st sess., pp. 3-5. Section 351 of the Revenue Act of 1937 increased the rates to 65 percent of the undistributed adjusted net income of personal holding companies not in excess of \$2,000 plus 75 percent of such income in excess of \$2,000. The same rates were imposed by section 401 of the Revenue Act of 1938. This surtax was imposed in addition to the tax levied upon the taxable net income of corporations generally under section 13 of the Revenue Act of 1938 and corresponding sections of prior revenue acts referred to. See *Schinebro, Inc.*, 45 B. T. A. 580; affirmed on this point, 131 Fed. (2d) 504. The high surtax changed the tax status of a personal holding company from a tax benefit to a tax burden.

to the individual or individuals who caused its creation. The increased taxes were directed to the elimination of so flagrant a scheme of tax avoidance. The motive of tax avoidance which prompted creation of such a corporation would undoubtedly under the circumstances suggest a dissolution of the corporation for the purpose of minimizing tax liability, and we think petitioners' contention that, had they had reason to believe the tax assessed would be imposed the Wheeler Co. would not have been liquidated, is without substance.

The provisions of subsection (E) of section 112 (b) (7) were originally offered as an amendment to section 115 (c) as contained in the 1938 Revenue Bill (H. R. 9682) by Senator George for the [56] purpose of encouraging and facilitating prompt liquidation of personal holding companies, and other corporations falling outside of the technical classification of personal holding companies, which had not been used to evade taxes and had no substantial accumulation of earnings and profits but held real estate or unlisted corporate securities which were not readily marketable and had greatly appreciated in value, by postponing the tax on such unrealized appreciation in value imposed upon stockholders upon liquidation until the property is sold by the stockholders. He stated that the imposition of tax in such cases based upon the entire appreciation in value, even though unrealized from a business point of view, frequently compelled the sale of the property to establish the amount of taxable

gain or to raise the amount required to pay the tax, which discouraged liquidation, as a result of which the property remained frozen in the corporation since any gain realized from a sale of the assets by the corporation would not be entitled to the benefits of the capital gain provision when distributed to the stockholders. (Cong. Rec., vol. 83, pp. 5171-5172.)

The amendment offered by Senator George was finally incorporated in section 112, entitled "Recognition of Gain or Loss," and not in section 115, dealing with "Distributions by Corporations." This is highly significant. It indicates clearly that the terms and provisions thereof should be interpreted in the light of and in harmony with the rules and principles established by section 112, and sections 111 and 113 closely related therewith, and not by the principles established by cases relied upon by petitioners, particularly those which involved the question whether or not a corporate distribution was a taxable dividend within the meaning of section 115 of the Revenue Act of 1938 or the corresponding section of prior revenue acts. Section 112 (b) (7) makes no reference to section 115. In our opinion a reading of the statement made by Senator George and the fact of the inclusion of the amendment offered by him as an amendment to section 115 in section 112 instead of section 115 should have forewarned the petitioners that their interpretation of section 112 (b) (7) was mistaken and incorrect and not in accord with Congressional intent. By section 501 of the Second Revenue Act of 1940 such intent was made specific, as appears from Report No. 2894

from the Committee on Ways and Means, 76th Cong., 3d sess., pp. 41-42, pertaining to section 401 (later 501) amending section 115, wherein it is stated that:

The purpose of this amendment is to clarify the law with respect to what constitutes earnings and profits of a corporation. This is important not only for the purpose of determining whether distributions are taxable dividends but also in determining equity invested capital for excess-profits tax purposes. [57]

* * * The rule, applied by the Treasury under existing law, is that while gains or losses which are not recognized by reason of the provisions of section 112 neither increase or diminish the earnings or profits, the earnings or profits are increased or diminished by the entire amount of the recognized gain or loss, computed in accordance with the provisions of sections 111, 112 and 113. Together with the provisions of section 115 (h) of the Internal Revenue Code, and the principles established in *Commissioner v. Sansome*, 60 F. (2d) 931, and following decisions, the rule effectuates the provisions of section 112. * * *

The purpose of the amendment was not to provide a method of tax avoidance to stockholders of personal holding companies, but to provide for a post-ponement of tax to the extent of so much of the tax as would be imposed on the portion of the gain to the stockholders represented by an increase in value of the assets distributed, i. e., a gain which had not been realized by the corporation or the stockholders

from a business point of view. Increase or appreciation in value of corporate assets would be reflected in the gain realized by stockholders upon liquidation because the fair market value of such assets upon liquidation is a factor in determining gain or loss to the stockholders. Herein the gain, including the appreciation in value between cost to the transferors and value at the time of exchange, was realized upon the sale by the corporation of the securities transferred to it for its stock.

The gain realized by the stockholders of the Wheeler Co. upon its liquidation in 1938 was taxable under the Revenue Act of 1938 either under section 112 (b) (7) to the extent therein provided or under section 115 (c) of that act in the event the election granted by section 112 (b) (7) had not been exercised. Hence section 501 (a) of the Second Revenue Act of 1940 did not impose a tax upon a transaction the gains of which were not taxable in 1938, as was the situation in *Nichols v. Coolidge*, *supra*; *Blodgett v. Holden*, *supra*; and *Untermeyer v. Anderson*, *supra*. Such cases are not controlling herein. Justice Brandeis, in his dissenting opinion in *Untermeyer v. Anderson*, *supra*, stated: "Except for the peculiar tax involved in *Nichols v. Coolidge*, * * * no federal revenue measure has ever been held invalid on the score of retroactivity." In *Seattle v. Kelleher*, 195 U. S. 351, liability for taxes under retroactive legislation was stated to be "one of the notorious incidents of social life." Petitioners cited no other case holding a revenue statute invalid on the ground of retroactivity decided since

Untermeyer v. Anderson, *supra*. All the cases cited by them on briefs decided since the promulgation of the above three cases held the statutes involved valid, although attacked because retroactive in application.

Under section 112 (b) (7) each stockholder was taxable on (i) so much of his gain as was not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, [58] 1913, and (ii) so much of the remainder of his gain as was not in excess of the amount by which the value of that portion of the assets received by him which consisted of money, or stock or securities acquired by the corporation after April 9, 1938, exceeded his ratable share of such earnings and profits. The gain described in (i) was taxable as a dividend and the gain described in (ii) was taxable as a short term or long term gain, as the case might be. Tax on any gain above the gains enumerated was postponed until the disposition by the stockholder of the property received by him on liquidation. Taking the case of John H. Wheeler as illustrative, it appears that his gain on liquidation was \$159,177.85 as computed by the respondent, the correctness of which determination is not in dispute. The respondent determined that this gain was recognizable under section 112 (b) (7) to the extent of \$66,809.55, consisting of his ratable portion of securities acquired by the Wheeler Co. after April 9, 1938, of the value of \$346.94 and cash of \$55.92, both taxable as capital gain, and his ratable

share of corporate earnings and profits of \$66,406.69 taxable as a dividend. As hereinafter stated, the petitioners claim, and correctly so, that the amount of corporate earnings and profits as determined by the respondent should be reduced by the amount of \$5,953.06, additional surtax on undistributed profits for 1936. Since John H. Wheeler owned one-half of the stock, his ratable share of the corporate earnings will be reduced by one-half of such amount and the amount of gain recognizable to him will be reduced accordingly. The remainder of the gain is not recognizable under section 112 (b) (7) for tax purposes until and unless realized by the stockholder on the disposition of the securities received by him on liquidation. Furthermore, the basis of such securities for computing gain or loss on future sales or other disposition thereof under the provisions of section 113 (a) (18) is decreased by the amount of cash received and increased by the amount of gain recognizable to him, which results in a substantially increased basis to the stockholder. Whether or not he will ever pay a tax on the gain not recognizable under section 121 (b) (7) can not be presently determined. If the stockholders had not elected to liquidate under section 112 (b) (7), the gain to the extent of 50 percent would have been taxable to John H. Wheeler under section 115 (c), or the amount of \$79,588.93. It cannot be said that the application of the provisions of section 501 (a) to section 112 (b) (7) results in a harsh tax, since the gain recognizable thereunder is substantially less than the amount of gain which would have been tax-

able under section 115 (c). That the tax under section 112 (b) (7) is more than petitioners expected to pay by reason of their interpretation of the provisions of that section is not a ground for declaring section 501 invalid as arbitrary and con- [59] fiscatory. The petitioners elected to be taxed under section 112 (b) (7) and they can not complain if such election resulted in a greater tax than they expected to pay. It may be noted that the Wheeler Co. apparently was not the type of corporation section 112 (b) (7) was intended to aid. It did not hold "frozen" assets which had increased in value, which increase, although not realized, would have been taxable to the stockholders. The gain taxed was not an unrealized gain represented merely by an appreciation in value of assets held by the corporation; it represented a gain realized on sales by the Wheeler Co. of securities turned over to it by decedent and his wife, under sections 111, 112, and 113. As pointed out above, applying section 501 (a) to section 112 (b) (7), the gain recognizable was less than it would have been under section 115 (c), so that the petitioners were benefited to that extent at least.

We therefore conclude that section 501 of the Second Revenue Act of 1940 is not unconstitutional as applied to section 112 (b) (7) of the Revenue Act of 1938.

The petitioners do not question the amount of earnings and profits computed by the respondent under section 112 of the Revenue Act of 1938 as amended by section 501 of the Second Revenue Act of 1940, except that it is contended that, if section

501 is applicable, earnings and profits should be reduced by the amount of \$5,953.06. The Wheeler Co. in its 1936 return, in computing its surtax on undistributed profits, claimed a dividends paid credit of \$30,465.41, which the respondent disallowed, resulting in a deficiency in surtax on undistributed profits in the amount of \$5,935.06. The action of the respondent was approved by this Court in *Estate of John H. Wheeler*, 1 T. C. 401. The evidence therein showed that the 1936 income tax return of the company was made on the cash basis, which indicates that the books were kept on such basis. The respondent contends that the determination of earnings and profits available for distribution of dividends must follow the method of accounting employed by the corporation in computing its taxable income. In *M. H. Alworth Trust*, 46 B. T. A. 1045 (appeal pending, C. C. A., 8th Cir., Sept. 8, 1942), wherein a like question was involved and a similar argument was made by the respondent, it was held that, although the taxable income of the taxpayer therein was computed on the cash basis, in determining earnings and profits available for distribution as dividends, accrued but unpaid taxes must be taken into account. The decision in that case is controlling herein. The computation of the respondent, in so far as he failed to take into account the amount of \$5,953.06, accrued but unpaid surtax on undistributed profits for 1936, is therefore erroneous.

Decisions will be entered under Rule 50. [60]

Elliott H. Wheeler et al vs.

The Tax Court of the United States
Washington

Docket No. 107255

ESTATE OF JOHN H. WHEELER, DE-
CEASED, ELLIOTT H. WHEELER AND
ROLLO C. WHEELER, EXECUTORS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's opinion promulgated February 24, 1943, the respondent herein having filed a recomputation of tax on April 1, 1943, and petitioner having filed an acquiescence therein on April 26, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$28,123.46 for the calendar year 1938.

(Seal) (Signed) WILLIAM W. ARNOLD
Judge.

Entered Apr. 29, 1943. [61]

Commissioner of Internal Revenue

In The Tax Court of the United States

Docket No. 107255

Docket No. 107258

Docket No. 107260

Docket No. 107263

Docket No. 107265

**ESTATE OF JOHN H. WHEELER, DE-
CEASED**

CORNELIA W. GOOD

ELLIOTT H. WHEELER

FRANCES V. WHEELER

YSABEL F. BERLINER,

Petitioners,

v.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

**PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT OF A DEC-
ISION OF THE TAX COURT OF THE
UNITED STATES**

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Elliott H. Wheeler and Rollo C. Wheeler, as
executors of the last will and testament of John H.
Wheeler, deceased, respectfully petition this court
to review the decision of The Tax Court of the
United States entered on April 29, 1943, pursuant
to an opinion promulgated by that court on Feb-
ruary 24, 1943, and they allege:

I. VENUE

Petitioners Elliott H. Wheeler and Rollo C. Wheeler were appointed executors of the last will and testament of [62] John H. Wheeler, deceased, by the Superior Court of the State of California, in and for the County of Napa, on July 5, 1939. Ever since said date they have been and now are the duly appointed, qualified and acting executors of the last will and testament of said decedent, who died in the County of Napa on June 14, 1939.

The decedent filed his income tax return for the year 1938 with the Collector of Internal Revenue, First District of California, in the City and County of San Francisco, State of California. An assessment against the estate of said decedent for income taxes claimed to be due for the year 1938 was the subject matter of said proceedings in The Tax Court of the United States. The circuit Court of Appeals for the Ninth Circuit is the court in which petitioners seek a review of said decision of April 29, 1943.

II. NATURE OF THE CONTROVERSY

Decedent was a stockholder of the John H. Wheeler Company, a California corporation. The John H. Wheeler Company was a personal holding corporation. When incorporated it had issued its capital stock in exchange for certain securities transferred to it by its incorporators. In 1938 the decedent and all of the other stockholders of the

John H. Wheeler Company elected to liquidate said company under the provisions of Section 112 (b) (7) of the Revenue Act of 1938. Under this [63] section that portion of the gain realized by each stockholder on liquidation which was not in excess of his ratable share of the earnings and profits of the corporation was recognizable and taxable as a dividend. In computing gain or loss for income tax purposes on the sale of the securities transferred to it in exchange for its capital stock, the corporation used its transferors' basis, but in computing the earnings and profits as shown by its books of account, and for the purpose of Section 112 (b) (7), it used as a basis the fair market value of the securities at the time they were exchanged for its capital stock. The Commissioner of Internal Revenue used the transferors' basis in computing earnings and profits under Section 112 (b) (7) of the Revenue Act of 1938, and in doing so relied on the provisions of Section 501 of the Second Revenue Act of 1940. The application by the Commissioner of the provisions of Section 501 of the Second Revenue Act of 1940 to the dissolution which had been completed in 1938, resulted in a deficiency of \$28,123.46 in income taxes over the amount of taxes paid by the decedent in 1938. Petitioners protested the application by the Commissioner of the provisions of Section 501 of the Second Revenue Act of 1940 to a dissolution which had been completed in the year 1938. The Tax Court of the United States approved the action of the Commissioner and decided that there was a deficiency in income taxes due from the estate of

said decedent of \$28,123.46 for the calendar year 1938. [64]

III.

ASSIGNMENTS OF ERROR

Petitioners assign as error the following acts and omissions of The Tax Court of the United States:

(1) The finding that any additional taxes are due from the estate of said decedent on income received by, or chargeable to, said decedent in the year 1938;

(2) The failure to apply to the dissolution of the John H. Wheeler Company in the year 1938 the provisions of Section 112 (b) (7) of the Revenue Act of 1938 and the definition of the words "earnings and profits," which are found in this section, as such definition is uniformly established by the decisions of the courts of the United States;

(3) In applying retroactively the provisions of Section 501 of the Second Revenue Act of 1940 to the liquidation of the John H. Wheeler Company when this liquidation had been effected pursuant to the provisions of Section 112 (b) (7) of the Revenue Act of 1938;

(4) The failure to find that Section 501 of the Second Revenue Act of 1940 would violate the due process clause of the Fifth Amendment of the Constitution of the United States if it be applied to the dissolution in 1938 of a corporation liquidated and dissolved pursuant to the provisions of Section 112 (b) (7) of the Revenue Act of 1938;

(5) In holding that the application of the provisions of [65] Section 501 of the Second Revenue Act

of 1940 to Section 112 (b) (7) of the Revenue Act of 1938 does not result in a tax which might not have been expected or anticipated;

(6) In assigning tax avoidance as the motive for the formation or the dissolution of the John H. Wheeler Company;

(7) In finding that the John H. Wheeler Company would have been liquidated by its stockholders even though Section 112 (b) (7) of the Revenue Act of 1938 had not been made the law of the United States;

(8) In finding that it was advisable for the John H. Wheeler Company to liquidate.

Wherefore, petitioners pray that the decision of The Tax Court of the United States made and entered in the above entitled matter on April 29, 1943, pursuant to an opinion of said court which had been promulgated on February 24, 1943, be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and the rules of said Circuit Court for filing therein, and that all appropriate action be taken to the end that the errors complained of herein may be rectified and corrected by said Court.

VINCENT H. O'DONNELL

Attorney for petitioners, Elliott H. Wheeler and Rollo C. Wheeler, executors of the last will and testament of John H. Wheeler, Deceased

1820 Mills Tower, San Francisco, California [66]

State of California,
City and County of San Francisco.—ss.

Vincent H. O'Donnell, being first duly sworn, deposes and says:

I am the attorney of record for the petitioners named in the foregoing petition for review. I have read said petition for review and know the contents thereof. The facts set forth therein are true of my own knowledge.

VINCENT H. O'DONNELL

Subscribed and sworn to before me, this 23rd day of July, 1943

(Seal)

CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed July 26, 1943. [67]

[Title of Tax Court and Cause.]

Dockets Numbered 107255, 107258, 107260,
107263, and 107265

**NOTICE OF FILING PETITION
FOR REVIEW**

To the Respondent, the Commissioner of Internal Revenue, and to John P. Wenchel, Chief Counsel, Attorney for Respondent, Bureau of Internal Revenue Building, Washington, D. C.:

You, and Each of You, Are Hereby Notified that on this 24th day of July, 1943, a petition by Elliott H. Wheeler and Rollo C. Wheeler, as executors of the last will and testament of John H. Wheeler,

deceased, for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States entered in the above entitled cause on April 29, 1943, pursuant to a decision which had been promulgated on February 24, 1943, was mailed by United States Mail to the Clerk of The Tax Court of the United States by said Elliott H. Wheeler and Rollo C. Wheeler, as executors of the last will and testament of John H. Wheeler, deceased. A copy of the petition as filed is attached hereto and served upon you.

Dated: July 24th, 1943.

(S) VINCENT H. O'DONNELL.

Attorney for Elliott H. Wheeler and Rollo C. Wheeler, executors of the last will and testament of John H. Wheeler, deceased. [68]

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 27th day of July, 1943.

(S) J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue; Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed July 28, 1943.

[69]

In the Tax Court of the United States

Docket No. 107255

**ESTATE OF JOHN H. WHEELER,
DECEASED,**

Petitioner,

v.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

**STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY**

On the review of the decision of The Tax Court of the United States in the above entitled proceedings by the United States Circuit Court of Appeals for the Ninth Circuit, the petitioner above named intends to rely upon the following:

1. The oral and written stipulation of facts entered into by the petitioner and the respondent at the trial on May 24, 1941, before The Tax Court of the United States; and

2. The assignments of error set forth by the petitioner above named in its petition for review filed in the above entitled proceedings on July 26, 1943.

Dated: August 2, 1943.

VINCENT H. O'DONNELL

Attorney for the petitioner
above named.

Service of the foregoing statement of points on which petitioner intends to rely is hereby admitted this 17th day of August, 1943.

J. P. WENCHEL

C A R

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Aug. 18, 1943. [70]

[Title of Tax Court and Cause.]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed:—

(1) The record, proceedings and evidence to be included in the record on appeal in the above entitled matter shall be the parts of the record, proceedings and evidence set forth in the Designation of Contents of Record on Appeal, which is attached to and is made a part of this stipulation;

(2) A single record on appeal shall be prepared containing all of the matters designated in said appellant's Designation of Contents of Record on Appeal, without duplication, save as hereinafter provided, for use in connection with the petitions for review and the proceedings on appeal which bear the following docket numbers:

Name of Petitioner:	Docket Number
Estate of John H. Wheeler, deceased.....	107255
Cornelia W. Good	107258

Elliott H. Wheeler	107260
Frances V. Wheeler	107263
Ysabel F. Berliner	107265

[71]

(3) Only the petition for redetermination filed on May 12, 1941, in docket No. 107255 and the answer thereto need be made part of said record on appeal. It is stipulated in this connection that all of the petitions for redetermination and all of said answers to said petitions filed by the petitioners under the five docket numbers above cited are substantially identical and differ only as to the names of the taxpayers and the amounts of taxes involved;

(4) Only the petition for review filed under docket No. 107255 and the notice of filing the petition for review in proceeding No. 107255 need be made a part of the record. It is further stipulated in this connection that all of the petitions and all of the notices filed under the five docket numbers above noted are substantially identical and differ only as to the names of the taxpayers and the amounts of taxes involved;

(5) Only the statement of the points on which the petitioners intend to rely under docket No. 107255 need be made part of the record, and it is further stipulated in this connection that the statements filed under the other docket numbers are substantially identical and differ only as to the names of the taxpayers and the amounts of taxes involved;

(6) Only this stipulation as to record filed under docket No. 107255 need be made part of the said

record, and it is further stipulated in this connection that the stipulations filed under the other docket numbers are substantially identical and differ only as to the names of the taxpayers involved;

[72]

(7) The Circuit Court of the United States in and for the Ninth Circuit may consolidate said proceedings under the above noted docket numbers for purposes of record, briefing, hearing and decision, and for all other purposes.

Dated: August 2, 1943.

VINCENT H. O'DONNELL

Attorney for petitioner above
named.

(Signed) J. P. WENCHEL

[ILLEGIBLE]

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review. [73]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

In compliance with the provisions of paragraph (a) of Rule 75 of the Rules of Civil Procedure for the District Courts of the United States as made applicable to review of a decision of the Tax Court of the United States by Rule 30 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the above-named petitioners and respondent hereby designate the portions of the record, proceedings, and evidence to form the rec-

ord on review of the above-entitled proceedings, to wit:

1. All docket entries in the proceedings before the Tax Court of the United States.

2. The petition for redetermination filed May 12, 1941, in docket No. 107255.

3. The answer to said petition filed July 8, 1941, in docket No. 107255.

4. The stipulation of facts dated March 27, 1942, filed in these proceedings on May 24, 1942.

5. The oral stipulation on the hearing on May 24, 1942, as reported by the official reporter of the above-entitled Court.

6. Petitioner's exhibits No. 1 and No. 2 received in evidence in the above-entitled matter.

7. Findings of fact and memorandum of opinion of the [74] Tax Court promulgated on February 24, 1943, in the above-entitled matter.

8. Decision of the Tax Court entered April 29, 1943, in the above-entitled matter.

9. Petition for review by the United State Circuit Court of Appeal for the Ninth Circuit of the decision of the Tax Court of the United States, filed in docket No. 107255, in the above-entitled matter.

10. Notice of filing petition for review and admission of service thereof, filed in docket No. 107255.

11. Statements of points on which petitioners intend to rely, bearing the date hereof, filed in docket No. 107255.

12. Order of the United States Circuit Court of

Appeals, Ninth Circuit, for consolidation of the record.

13. This designation of contents of record on appeal, and the stipulation which precedes it, as filed in docket No. 107255.

Dated: August 2, 1943.

VINCENT H. O'DONNELL

Attorney for Petitioners

(Signed) J. P. WENCHEL

[ILLEGIBLE]

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

[Endorsed]: T.C.U.S. Filed Aug. 18, 1943. [75]

The Tax Court of the United States
Washington

Docket No. 107255

ESTATE OF JOHN H. WHEELER, DECEASED, CORNELIA W. GOOD, ELLIOTT H. WHEELER, FRANCIS V. WHEELER, YSABEL F. BERLINER,

Petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing

pages, 1 to 75, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 23d day of August, 1943.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the United
States.

APPEARANCES:

For Taxpayer:

**VINCENT H. O'DONNELL, Esq.,
JOHN D. BRETHAUER, C.P.A.,**

For Comm'r:

HARRY R. HORROW, Esq.,

Docket No. 107258

MRS. CORNELIA W. GOOD,

Petitioner,

vs.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

DOCKET ENTRIES

1941

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 12—Copy of petition served on General Counsel.

May 12—Request for hearing in San Francisco, Calif., filed by taxpayer. 5-12-41 copy served.

May 26—Praecipe for appearance of John D. Brethauer, as counsel for petitioner, filed.

Jul. 8—Answer filed by General Counsel.

Jul. 15—Copy of answer served on taxpayer. San Francisco, California.

1942

Feb. 25—Hearing set March 23, 1942—San Francisco, California.

Mar. 28—Hearing had before Mr. Arnold on merits—Submitted. Counsel moves to consolidate Dockets 107255-58-60-63 and 65, granted. Stipulation of facts filed. Briefs due May 15, 1942. Replies June 15, 1942.

Apr. 20—Transcript of hearing 3-28-42 filed.

May 15—Brief filed by taxpayer. (5-16-42—3 copies received).

May 15—Brief filed by General Counsel. Copy served 5-16-42.

May 16—Copy of brief served on General Counsel.

Jun. 15—Reply brief filed by taxpayer.

Jun. 15—Reply brief filed by General Counsel. Copy served 6-16-42.

Jun. 15—Copy of reply brief served on General Counsel.

1943

Feb. 24—Opinion rendered—Arnold, Judge. Div. 12. Decision will be entered under Rule 50. 3-3-43 Copy served.

Apr. 1—Computation of deficiency filed by General Counsel.

Apr. 3—Hearing set May 5, 1943 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 29—Decision entered. Arnold, Judge. Div. 12.

Jul. 26—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Jul. 26—Affidavit of service by mail filed by taxpayer.

1943

Jul. 28—Proof of service of filing petition for review filed by taxpayer.

Aug. 18—Statement of points with proof of service thereon filed.

Aug. 18—Stipulation re record with agreed praecipe attached, filed. [1*]

The Tax Court of the United States
Washington

Docket No. 107258

CORNELIA W. GOOD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's opinion promulgated February 24, 1943, the respondent herein having filed a recomputation of tax on April 1, 1943, and petitioner having filed an acquiescence therein on April 26, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,561.51 for the calendar year 1938.

(Signed) WILLIAM W. ARNOLD

[Seal]

Judge.

Entered April 29, 1943. [2]

[Title of Tax Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 2, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office deleted as called for by Praecipe and Stipulation of the Parties filed in Docket Number 107255.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 23d day of August, 1943.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the United
States.

APPEARANCES:

For Taxpayer:

**VINCENT H. O'DONNELL, Esq.,
JOHN D. BRETHAUER, C.P.A.,**

For Comm'r:

HARRY R. HORROW, Esq.,

Docket No. 107260

ELLIOTT H. WHEELER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1941

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 12—Copy of petition served on General Counsel.

May 12—Request for hearing in San Francisco, Calif., filed by taxpayer. 5-12-41 copy served.

May 26—Praecipe for appearance of John D. Brethauer, as counsel for petitioner, filed.

Jul. 8—Answer filed by General Counsel.

Jul. 15—Copy of answer served on taxpayer. San Francisco, California.

1942

Feb. 25—Hearing set March 23, 1943—San Francisco, California.

Mar. 28—Hearing had before Mr. Arnold on merits—Submitted. Counsel moves to consolidate Dockets 107255-58-60-63 and 65, granted. Stipulation of facts filed. Briefs due May 15, 1942. Replies June 15, 1942.

Apr. 20—Transcript of hearing 3-28-42 filed.

May 15—Brief filed by taxpayer. (5-16-42—3 copies received).

May 15—Brief filed by General Counsel. Copy served 5-16-42.

May 16—Copy of brief served on General Counsel.

Jun. 15—Reply brief filed by taxpayer.

Jun. 15—Reply brief filed by General Counsel. Copy served 6-16-42.

Jun. 15—Copy of reply brief served on General Counsel.

1943

Feb. 24—Opinion rendered—Arnold, Judge. Div. 12. Decision will be entered under Rule 50. 3-3-43 Copy served.

Apr. 1—Computation of deficiency filed by General Counsel.

Apr. 3—Hearing set May 5, 1943 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 29—Decision entered. Arnold, Judge. Div. 12.

Jul. 26—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Jul. 26—Affidavit of service by mail filed by taxpayer.

1943.

Jul. 28—Proof of service of filing petition for review filed by taxpayer.

Aug. 18—Statement of points with proof of service thereon filed.

Aug. 18—Stipulation re record with agreed praecipe attached, filed. [1*]

The Tax Court of the United States
Washington

Docket No. 107260

ELLIOTT H. WHEELER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's opinion promulgated February 24, 1943, the respondent herein having filed a recomputation of tax on April 1, 1943, and petitioner having filed an acquiescence therein on April 26, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,009.20 for the calendar year 1938.

(Signed) WILLIAM W. ARNOLD

[Seal] Judge.

Entered April 29, 1943. [2]

[Title of Tax Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 2, inclusive contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office deleted as called for by Praecipe and Stipulation of the parties filed in Docket Number 107255.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 23d day of August, 1943.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the United
States.

APPEARANCES:

For Taxpayer:

VINCENT H. O'DONNELL, Esq.,
JOHN D. BRETHAUER, C.P.A.,

For Comm'r:

HARRY R. HORROW, Esq.,

Docket No. 107263

MRS. FRANCES V. WHEELER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1941

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 12—Copy of petition served on General Counsel.

May 12—Request for hearing in San Francisco, Calif., filed by taxpayer. 5-12-41 copy served.

May 26—Praecipe for appearance of John D. Brethauer, as counsel for petitioner, filed.

Jul. 8—Answer filed by General Counsel.

Jul. 15—Copy of answer served on taxpayer. San Francisco, California.

1942

Feb. 25—Hearing set March 23, 1942—San Francisco, California.

Mar. 28—Hearing had before Mr. Arnold on merits—Submitted. Counsel moves to consolidate Dockets 107255-58-60-63 and 65, granted. Stipulation of facts filed. Briefs due May 15, 1942. Replies June 15, 1942.

Apr. 20—Transcript of hearing 3-28-42 filed.

May 15—Brief filed by taxpayer. (5-16-42—3 copies received).

May 15—Brief filed by General Counsel. Copy served 5-16-42.

May 16—Copy of brief served on General Counsel.

Jun. 15—Reply brief filed by taxpayer.

Jun. 15—Reply brief filed by General Counsel. Copy served 6-16-42.

Jun. 15—Copy of reply brief served on General Counsel.

1943

Feb. 24—Opinion rendered—Arnold, Judge. Div. 12. Decision will be entered under Rule 50. 3-3-43 Copy served.

Apr. 1—Computation of deficiency filed by General Counsel.

Apr. 3—Hearing set May 5, 1943 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 29—Decision entered. Arnold, Judge. Div. 12.

Jul. 26—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Jul. 26—Affidavit of service by mail filed by taxpayer.

1943

Jul. 28—Proof of service of filing petition for review filed by taxpayer.

Aug. 18—Statement of points with proof of service thereon filed.

Aug. 18—Stipulation re record with agreed praecipe attached, filed. [1*]

The Tax Court of the United States
Washington

Docket No. 107263

FRANCIS V. WHEELER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's opinion promulgated February 24, 1943, the respondent herein having filed a recomputation of tax on April 1, 1943, and petitioner having filed an acquiescence therein on April 26, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,546.02 for the calendar year 1938.

(Signed) WILLIAM W. ARNOLD

[Seal] Judge.

Entered April 29, 1943. [2]

[Title of Tax Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 2, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office deposed as called for by Praecipe and Stipulation of the Parties filed in Docket Number 107255.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 23d day of August, 1943.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the United
States.

APPEARANCES:

For Taxpayer:

VINCENT H. O'DONNELL, Esq.,

JOHN D. BRETHAUER, C.P.A.,

For Comm'r:

HARRY R. HORROW, Esq.,

Docket No. 107265

MRS. YSABEL F. BERLINER,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1941

May 12—Petition received and filed. Taxpayer notified. Fee paid.

May 12—Copy of petition served on General Counsel.

May 12—Request for hearing in San Francisco, Calif., filed by taxpayer. 5-12-41 copy served.

May 26—Praecipe for appearance of John D. Brethauer, as counsel for petitioner, filed.

Jul. 8—Answer filed by General Counsel.

Jul. 15—Copy of answer served on taxpayer. San Francisco, California.

1942

Feb. 25—Hearing set March 23, 1942—San Francisco, California.

Mar. 28—Hearing had before Mr Arnold on merits
—Submitted. Counsel moves to consolidate
Dockets 107255-58-60-63 and 65, granted.
Stipulation of facts filed. Briefs due May
15, 1942. Replies June 15, 1942.

Apr. 20—Transcript of hearing 3-28-42 filed.

May 15—Brief filed by taxpayer. (5-16-42—3 copies received).

May 15—Brief filed by General Counsel. Copy served 5-16-42.

May 16—Copy of brief served on General Counsel.

Jun. 15—Reply brief filed by taxpayer.

Jun. 15—Reply brief filed by General Counsel. Copy served 6-16-42.

Jun. 15—Copy of reply brief served on General Counsel.

1943

Feb. 24—Opinion rendered—Arnold, Judge. Div. 12.
Decision will be entered under Rule 50.
3-3-43 Copy served.

Apr. 1—Computation of deficiency filed by General Counsel.

Apr. 3—Hearing set May 5, 1943 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 29—Decision entered. Arnold, Judge. Div. 12.

Jul. 26—Petition for review by U. S. Circuit Court
of Appeals, 9th Circuit, with assignments
of error filed by taxpayer.

Jul. 26—Affidavit of service by mail filed by taxpayer.

1943

Jul. 28—Proof of service of filing petition for review filed by taxpayer.

Aug. 18—Statement of points with proof of service thereon filed.

Aug. 18—Stipulation re record with agreed praecipe attached, filed. [1*]

The Tax Court of the United States
Washington

Docket No. 107265

YSABEL F. BERLINER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's opinion promulgated February 24, 1943, the respondent herein having filed a recomputation of tax on April 1, 1943, and petitioner having filed an acquiescence therein on April 26, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,384.96 for the calendar year 1938.

(Signed) WILLIAM W. ARNOLD

[Seal] Judge.

Entered April 29, 1943. [2]

[Title of Tax Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD**

I, B. D. Gamble, clerk of the Tax Court of the United States do hereby certify that the foregoing pages, 1 to 2, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office deleted as called for by Praecept and Stipulation of the parties filed in Docket Number 107255.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 23d day of August, 1943.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the United
States.

[Endorsed]: No. 10538. United States Circuit Court of Appeals for the Ninth Circuit. Elliott H. Wheeler and Rollo C. Wheeler, Executors of the Estate of John H. Wheeler, deceased, Cornelia W. Good, Elliott H. Wheeler, Francis V. Wheeler, and Ysabel F. Berliner, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review Decisions of Tax Court of the United States.

Filed September 1, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

T. C. Docket No. 107255

ESTATE OF JOHN H. WHEELER, Deceased,
Elliott H. Wheeler and Rollo C. Wheeler, Exec-
utors,

Petitioner on Review

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

T. C. Docket No. 107258

CORNELIA W. GOOD,

Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

T. C. Docket No. 107260

ELLIOTT H. WHEELER,

Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

T. C. Docket No. 107263

FRANCES V. WHEELER,

Petitioner on Review,

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

T. C. Docket No. 107265

YSABEL F. BERLINER,

Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

**ORDER FOR CONSOLIDATION
OF THE RECORD**

Upon consideration of the motion filed herein by counsel for the petitioners on review in the above entitled proceedings, moving the Court to consolidate said proceedings for purposes of the record, the briefing, the hearing, the decision and for all other purposes connected with the final disposition of such proceedings on review, it is this 24th day of August, 1943,

Ordered that said motion be and it is hereby granted.

It Is Further Ordered that a certified copy of the motion and this order be transmitted by the Clerk

of this Court to the Clerk of The Tax Board of the United States.

FRANCIS A. GARRECHT
United States Circuit Judge.

[Title of Circuit Court of Appeals and Causes.]

MOTION TO CONSOLIDATE PROCEEDINGS

The above named petitioners on review move the Court to consolidate the above entitled proceedings for purposes of the record, the briefing, the hearing, the decision, and for all other purposes connected with the final disposition of said proceedings on review.

Pursuant to a stipulation of the parties, the above entitled proceedings were consolidated for the purpose of trial, record, briefing and decision in The Tax Court of the United States. After a trial of the proceedings, decisions were rendered in each proceeding based upon one opinion which was promulgated by said Tax Court on February 24, 1943. Each petitioner on review relies upon the same record and upon identical grounds for reversal.

Petitioners rely upon Rule 75(k) of the Rules of Civil Procedure for the District Courts of the United States as their authority in support of this motion.

Dated: August 2, 1943.

VINCENT H. O'DONNELL

Attorney for the above named
petitioners on review,
1820 Mills Tower Building,
San Francisco, California.

NOTICE OF MOTION

To: J. P. Wenchel,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review,
Bureau of Internal Revenue Building,
Washington, D. C.

Please take notice, the undersigned will bring the foregoing motion on for hearing before the above entitled Court, Room 330 United States Courthouse and Post Office Building, San Francisco, California, on the 23rd day of August, 1943, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard.

VINCENT H. O'DONNELL

Attorney for the above named
petitioners on review,
1820 Mills Tower Building,
San Francisco, California.

Receipt of the foregoing motion for hearing and notice of motion is hereby admitted this 17th day of August, 1943.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney
for Respondent on Review.

[Endorsed]: Filed Aug. 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10538

ESTATE OF JOHN H. WHEELER, DECEASED,
Elliott H. Wheeler, and Rollo C. Wheeler,
Executors, CORNELIA W. GOOD, ELLIOTT
H. WHEELER, FRANCES V. WHEELER,
and YSABEL F. BERLINER,
Petitioners on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS ON WHICH PETITIONERS ON REVIEW INTEND TO RELY ON APPEAL

Pursuant to the provisions of Section 6 of Rule 19 of the Rules of the United States Circuit Court

of Appeals for the Ninth Circuit, the petitioners on review make the following statement of the points on which they intend to rely:

Points

(1) The failure of the Commissioner of Internal Revenue and The Tax Court to apply to the dissolution of the John H. Wheeler Company in the year 1938 the definition of the words "earnings and profits," which are found in Section 112(b)(7) of the Revenue Act of 1938, the definition of which is well established by the decisions of the courts of the United States;

(2) The application retroactively by The Tax Court and the Commissioner of Internal Revenue of the provisions of Section 501 of the Second Revenue Act of 1940 to the liquidation of the John H. Wheeler Company, when this liquidation had been effected pursuant to the provisions of Section 112(b)(7) of the Revenue Act of 1938;

(3) The failure of The Tax Court and the Commissioner to find that Section 501 of the Second Revenue Act of 1940 would violate the due process of the Fifth Amendment of the Constitution of the United States if it be applied to the dissolution in 1938 of a corporation liquidated and dissolved pursuant to the provisions of Section 112(b)(7) of the Revenue Act of 1938;

(4) Holding that the application of the provisions of Section 501 of the Second Revenue Act of 1940 to Section 112(b)(7) of the Revenue Act of 1938 does not result in a tax which might not have been expected or anticipated;

(5) Assigning tax avoidance as the motive for the formation or the dissolution of the John H. Wheeler Company:

(6) Finding that the John H. Wheeler Company would have been liquidated by its stockholders even though Section 112(b)(7) of the Revenue Act of 1938 had not been made the law of the United states;

(7) Finding that it was advisable for the John H. Wheeler Company to liquidate;

(8) Finding that any additional taxes are due from the petitioners on income received by, or chargeable to, said petitioners in the year 1938.

Petitioners will also rely upon all of the assignments of error set forth in their petitions for review, and they will also rely upon all of the stipulations set forth in the "Stipulation as to Record" dated August 2, 1943, entered into by their counsel and by counsel for the Commissioner.

DESIGNATION OF RECORD

Pursuant to said Section 6 of Rule 19 the petitioners hereby designate as the parts of the record which they think necessary for a consideration of their appeals the portions of the records, proceedings and evidence particularly referred to in the "Designation of Contents of Record on Appeal" dated August 2, 1943, which is attached to a "Stipulation as to Record" bearing the same date; which was filed in The Tax Court of the United States on or about August 18, 1943, and petitioners request

the Court to print all of the portions of the records, proceedings and evidence therein referred to, together with the foregoing statement.

Dated: September 25, 1943.

VINCENT H. O'DONNELL

Attorney for Petitioners on
Review

[Endorsed] Filed Sept. 27, 1943. Paul P.
O'Brien, Clerk.

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

No. 10638

Excerpt from proceedings of Wednesday, February 16, 1944

**Before GARRECHT and STEPHENS, Circuit Judges, and McCormick,
District Judge**

ELLIOTT H. WHEELER, ET AL., PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of submission

On ~~the~~ petition to review argued by Mr. Vincent O'Donnell, counsel for petitioners, and by Mr. Bernard J. Chertcoff, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

Excerpt from proceedings of Tuesday, May 16, 1944

Order directing filing of opinion and filing and recording of judgment

By direction of the Court, **ORDERED** that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

**Upon Petition to Review Decisions of the Tax Court of the
United States**

**Before GARRECHT and STEPHENS, Circuit Judges, and McCormick,
District Judge**

GARRECHT, Circuit Judge: The facts and questions of law involved are similar in five cases which have been consolidated.

The facts as stipulated by the parties were adopted by the Tax Court as its findings of fact.

John H. Wheeler Company was organized as a corporation under the laws of the State of California in the year 1925 by John H. Wheeler and Frances V. Wheeler, his wife. In the years following the organization of said company, and until the year 1929,

said John H. Wheeler and Frances V. Wheeler transferred to said company securities having a cost to them of \$304,683.49 in exchange for 4,918 shares of the common capital stock of said company. On the dates of exchange the securities transferred to John H. Wheeler Company for said 4,918 shares of its common capital stock had an aggregate fair market value of \$491,800.

In computing the gain or loss realized for federal income tax purposes on the sale of the particular securities which it had acquired following its organization, John H. Wheeler Company used the cost basis of said securities to its transferors, John H. Wheeler and Frances V. Wheeler.

In its books of account, said John H. Wheeler Company computed gain or loss on the sale of said particular securities by using the fair market value of the securities which were transferred to the corporation by John H. Wheeler and Frances V. Wheeler, as stated above.

On November 30, 1938, the books of account of the John H. Wheeler Company were closed and they showed a deficit of \$47,501.61. This deficit was caused principally by losses on the sale of securities acquired by the corporation following its organization computed on the basis of the fair market value of said securities at the time that they were transferred to the John H. Wheeler Company.

On December 2, 1938, John H. Wheeler, the decedent, Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good and Ysabel F. Berliner and Rollo C. Wheeler (the latter not being involved in any of these proceedings) were the holders of all of the outstanding shares of stock of the John H. Wheeler Company.

On said December 2, 1938, after giving consideration to the application of Section 112 (b) (7) of the Revenue Act of 1938, the stockholders of the John H. Wheeler Company dissolved said corporation and all of its assets were distributed in liquidation during the month of December, 1938, proportionately to the stockholders of said company.

Pursuant to the provisions of Section 112 (b) (7) of the Revenue Act of 1938, John H. Wheeler, Frances V. Wheeler, Elliott H. Wheeler, Cornelia W. Good, and Ysabel F. Berliner executed written elections on Form 964 to have recognized and taxed in accordance with said section the gains on the shares of the capital stock of the said John H. Wheeler Company owned by them on December 2, 1938. Said individuals, in filing the federal income tax returns for the year 1938, reported as long-term capital gains their proportionate share of the securities acquired by the John H. Wheeler Company subsequent to April 9, 1938, and the cash which was distributed in liquidation. The distribution in liquidation

was completed during the month of December 1938, as required by the 1938 law.

No claim is made by the respondent that the proceedings taken by the John H. Wheeler Company and its stockholders to dissolve the said company and distribute its assets under Section 112 (b) (7) of the Revenue Act of 1938 were defective or incomplete. Pertinent provisions of said Act are printed in the margin.¹

More than two years after the liquidation of the corporation, and after tax returns thereon had been made, Congress enacted Section 501 (a) of the Second Revenue Act of 1940.²

¹ (7). Election as to recognition of gain in certain corporate liquidations.

(A) *General rule.*—In the case of property distributed in complete liquidation of a domestic corporation, if

(i) the liquidation is made in pursuance of a plan of liquidation adopted after the date of the enactment of this Act, whether the taxable year of the corporation began on, before, or after January 1, 1938; and

(ii) the distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within the month of December 1938—

then in the case of each qualified electing shareholder (as defined in subparagraph (C)), gain upon shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subparagraphs (E) and (F).

(B) *Excluded corporation.*—The term "excluded corporation" means a corporation which at any time between April 9, 1938, and the date of the adoption of the plan of liquidation, both dates inclusive, was the owner of stock possessing 50 per centum or more of the total combined voting power of all classes of stock entitled to vote on the adoption of such plan.

(C) *Qualified electing shareholders.*—The term "qualified electing shareholder" means a shareholder (other than an excluded corporation) of any class of stock (whether or not entitled to vote on the adoption of the plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subparagraph (A) has been made and filed in accordance with subparagraph (D).

(D) *Making and filing of elections.*—The written elections referred to in subparagraph (C) must be made and filed in such manner as to be not in contravention of regulations prescribed by the Commissioner with the approval of the Secretary. The filing must be within thirty days after the adoption of the plan of liquidation, and may be by the liquidating corporation or by the shareholder.

(E) *Noncorporate shareholders.*—In case of a qualified electing shareholder other than a corporation—

(i) There shall be recognized, and taxed as a dividend, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, 1913, such earnings and profits to be determined as of December 31, 1938, but without diminution by reason of distributions made during the month of December 1938; and

(ii) There shall be recognized, and taxed as short-term or long-term capital gain, as the case may be, so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after April 9, 1938, exceeds his ratable share of such earnings and profits.

² (1) Effect on earnings and profits of gain or loss and of receipt of tax-free distributions. The gain or loss realized from the sale or other disposition (after February 28, 1913) of property by a corporation—

(a) for the purpose of the computation of earnings and profits of the corporation, shall be determined, except as provided in paragraph (2), by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain, except that no regard shall be had to the value of the property as of March 1, 1913; but

(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain.

Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made. Where in determining the adjusted basis used in computing such realized gain or loss the adjustment to the basis differs from the adjustment proper for the purpose of determining earnings or profits, then the latter adjustment shall be used in determining the increase or decrease above provided. For the purposes of this subsection, a loss with respect to which a deduction is disallowed under section 118, or a corresponding provision of a prior income-tax law, shall not be deemed to be recognized. Where a corporation receives (after February 28, 1913) a distribution from a second

Subsequently, on February 12, 1942, the Commissioner of Internal Revenue asserted a deficiency in the tax returns of 1938.

The Commissioner in his claim for deficiency did not follow the provisions of Section 112 (b) (7) of the Revenue Act of 1938, but instead made use of the 1940 Act. The formula adopted by the Commissioner is shown by the following figures:

Fair market value of 4,918 shares of Wheeler Co. stock or fair market value of securities exchanged therefor, set up on corporate books as cost of securities.....	\$491,800.00
Cost of securities to decedent and wife transferred by them to Wheeler Co. for its stock.....	304,684.40
Excess of corporate book value over transferors' cost.....	187,115.51
Less deficit on corporate books as of December 31, 1938.....	47,501.61
Surplus as of December 31, 1938, based on transferors' cost.....	139,613.90
Less excess of book value over transferors' cost of securities unsold at liquidation of Wheeler Co.....	8,800.52
Accumulated earnings and profits as of December 31, 1938, available for distribution to 4,918 shares of stock.....	132,813.38

The petitioners' computation of earnings and profits of Wheeler Co. differs from that of respondent in that petitioners assert that the earnings and profits of the John H. Wheeler Co. should be computed on the basis of cost to the company of the securities transferred to it in exchange for its 4,918 shares of stock, or on the basis of the fair market value of the securities on the date of transfer, and not the cost of the securities to the transferors as used by respondent in his computation of the deficiencies.

The Commissioner used the cost of the securities to Mr. and Mrs. Wheeler, the transferors at the time they acquired them, years before the formation of the corporation, as a basis for computing "earnings and profits," and he disregarded the increased market value they admittedly had at the time they were acquired by the corporation.

In other words, the respondent asserts that the gains which appear to inhere in the securities as computed by him, although unrealized by the shareholders, should nevertheless be classed as "earnings and profits" and taxed to petitioners as dividends. He claims as authority for his position Section 501 (a) of the Second Revenue Act of 1940. On the other hand, petitioners claim full compliance with the Act of 1938.

corporation which (under the law applicable to the year in which the distribution was made) was not a taxable dividend to the shareholders of the second corporation, the amount of such distribution shall not increase the earnings and profits of the first corporation in the following cases:

(1) No such increase shall be made in respect of the part of such distribution which (under such law) is directly applied in reduction of the basis of the stock in respect of which the distribution was made.

(2) No such increase shall be made if (under such law) the distribution causes the basis of the stock in respect of which the distribution was made to be allocated between such stock and the property received.

The language of the decision of the Tax Court betrays an animus against petitioners because they were stockholders in this John H. Wheeler Company, which was a personal holding company and which, as it is suggested, was made use of for the purpose (although within the law) of tax evasion. The courts have held that it was permissible for taxpayers to avail themselves of such legal means; petitioners should not be condemned if such were the fact, which does not appear in this record. [See *Bullen v. Wisconsin*, 240 U. S. 625]

It is also suggested that the dissolution of the company, likewise, was motivated by purposes of tax avoidance. This conclusion is also outside of the record.

Other statements of the Tax Court not supported by the record are that the Wheeler Company would have been liquidated by its stockholders even if Section 112 (b) (7) of the Revenue Act of 1938 had not been enacted into law. The Tax Court's opinion also seems to question the good faith of the liquidation of the corporation under this 1938 Act, in view of the attitude of the Commissioner firmly adhering to his regulation and refusing to abide by or acquiesce in court decisions.

These assumptions unconsciously create an atmosphere of prejudice which might easily impair an impartial approach to the issues to be determined.

Admittedly, Section 112 (b) (7) was enacted for the purpose of encouraging and facilitating prompt liquidation of personal holding companies. To apply the construction here contended for by the Commissioner would not have furnished such or any encouragement for liquidation.

The construction placed upon the statute submitted by petitioners does not result in tax avoidance to stockholders but reflects a fair postponement of tax to the extent of so much of the tax as is here sought to be imposed on such an assumed portion of gain to the stockholders as may be represented as an estimate of increase of the value of the assets distributed, which gain has not been actually realized either by the corporation or the stockholders.

The increase or appreciation in value of corporate assets will be reflected in any gain realized by stockholders when actually converted upon liquidation.

Section 112 (b) (7) of the Revenue Act of 1938 provides that upon complete liquidation of a domestic corporation under subsection (7) there shall be recognized and taxed as dividends the ratable share of the earnings and profits of the corporation accumulated after February 28, 1913. The petitioners contend that the term "earnings and profits" of the corporation for the purposes of Section 112 (b) (7) should be computed in accordance with the

rules and decisions of the courts which hold that "taxable income" is not the equivalent of "earnings and profits" and that on disposition by a corporation of property acquired by the corporation in exchange for its stock in a transaction wherein gain is not recognizable for the purposes of computing "taxable income," the basis of such property to the corporation for the purpose of determining "earnings and profits" available for distribution of dividends is the cost of the property to the corporation at the time of the exchange. The Government's contention is that Congress resolved this question by enacting Section 501 (a) in 1940, and that earnings and profits should be computed by applying the provisions of this law. Section 501 provides specifically that it shall apply to the 1938 law. The question for our consideration is whether this amendment can be applied to the voluntary liquidation of a corporation completed in the year 1938 pursuant to the Revenue Act of 1938 which by its very terms was to be effective and operative only during and for the year 1938.

The petitioners contend that Section 501 of the Second Revenue Act of 1940, if properly construed, is not applicable to voluntary liquidation and dissolution of a corporation commenced and completed in 1938, but if it is construed to be applicable to a liquidation completed in 1938 such construction violates the rule of "permissible retroactivity" and that therefore Section 501 is unconstitutional as in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

The petitioners have cited a number of cases which support their contention that the basis for determining "earnings and profits" is the cost of the property to the corporation at the time of the exchange.¹ The Government contends this is in error but cites no cases. The Government in its brief points out that the Commissioner lost some of these cases involving the interpretation of the words "earnings and profits" but that he never receded from his position. Indeed, upon the argument before this court counsel for appellant boasted that the Commission had flouted the court and absolutely refused to abide by its holdings and continually relied for its authority solely on Article 115.8, Treasury Regulations.² The Government in elaborating further on this point says that finally the passage of the Second Revenue Act of 1940, particularly Section 501 (a), made effective the Government's position on this point. It is our belief, however, that the cases do not support the Commissioner's position, for if they had it would not have been necessary for the Commissioner to base this case on

¹ Chase, 5 App. 18 B.T.A. 294; Ida I. McKim, 22 B.T.A. 440; E. M. Weyer, 25 B.T.A. 251; *Waller*, 25 B.T.A. 288; *W. A. Purcell Co.*, 25 B.T.A. 122; *W. A. Purcell Co.*, 25 B.T.A. 285; *A & J Inc.*, 25 B.T.A. 1244; *Realty*, 25 B.T.A. 1244.

² *Ida I. McKim*, 22 B.T.A. 440; *W. A. Purcell Co.*, 25 B.T.A. 122; *W. A. Purcell Co.*, 25 B.T.A. 285; *A & J Inc.*, 25 B.T.A. 1244; *Realty*, 25 B.T.A. 1244.

Section 501 (a) of the Second Revenue Act of 1940 or to have awaited for the enactment of such legislation before applying such interpretation of earnings and profits to the liquidation of the Wheeler Company.

Furthermore, in the very recent case of *Estate of Fisher et al. v. Commissioner*, Docket No. 104601 * * * Tax Court * * * [C. C. H. Dec. 13, 734 (M)], where the Tax Court held that Section 501 (c) of the Revenue Act of 1940 did not apply as the case was pending on September 20, 1940, the Tax Court held that the case was not controlled by the Revenue Act of 1940 but was rather controlled by the decisions which hold that the basis of determining earnings and profits is the fair market value when acquired. There is no question but that this was the law when the dissolution of the Wheeler Corporation took place in 1938 and it is still the law where the Revenue Act of 1940 is not applicable.

The Government has based its case on the assumption that this Revenue Act of 1940 was clarifying legislation. It is true that Section 501 in its original draft recited that it was clarifying legislation, but this was eliminated before its passage. This position is untenable because the Commissioner's determination on earnings and profits had been challenged and, as the Government states, "the Commissioner lost some of these cases." While Section 501 specifically endorsed his position, still, if the law were clearly to the contrary as it was here, the section in question can not be said to be clarifying. It is obvious that it is a subsequent enactment in the law to obviate the force of the contrary court decisions and to change the law to give support to the Commissioner's position.

We come to the real point in issue—whether the legislation in question is permissibly retroactive when applied to the dissolution of the Wheeler Company in 1938.

First, it must be pointed out that Section 501 (a) of the Second Revenue Act of 1940 was passed by Congress in the second year after the corporation was dissolved and income tax paid and there were three Revenue Acts passed between the dissolution of the Wheeler Company and the enactment of Section 501 (a).

The rule is that revenue acts are not unconstitutional merely because they are retroactive [*Untermeyer v. Anderson*, 276 U. S. 449; *Billings v. United States*, 222 U. S. 261, 299; *Hecht v. Malley*, 225 U. S. 144] * * * whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. *Untermeyer v. Anderson*, *supra*.

In the year 1938, the Supreme Court decided the case of *Welch v. Henry*, 305 U. S. 134. In that case we find the best summary and statement of the law in respect to retroactive legislation:

"The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of the tax laws, to distribute the increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated. We cannot say that due process which the Constitution exacts denies that opportunity to legislatures; that it withholds from them, more than in the case of a prospective tax, authority to distribute the increased tax burden in the light of experience and in conformity with accepted notions of the requirements of equal protection; or that in view of well established legislative practice, both state and national, taxpayers can justly assert surprise and complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available. And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, *Cooper v. United States*, 280 U. S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment [Also, *U. S. v. Hudson*, 290 U. S. 498, 500].

"The Joint Resolution of Congress of July 4, 1864, No. 77, 13 Stat. 417, imposed an additional tax on incomes earned during the calendar year 1863, this tax being imposed after the taxes for the year had been paid. In *Stockdale v. Insurance Companies*, *supra*, 331, Mr. Justice Miller said of it: 'The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted. . . . no one doubted the validity of the tax or attempted to resist it.' The Act of February 24, 1919, c. 18, Tit. 2, 40 Stat. 1057, 1058-1059, which taxed incomes for the calendar year 1918, was applied without question as to its constitutionality in *United States v. Robbins*, 260 U. S. 315, and in other cases.

"In the present case, the returns of income received in 1933 were filed and became available in March 1934. Wisconsin, Stats. 1933, Sec. 71.09 (4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By Sec. 11, Art. IV; Sec. 4, Art. V, of the Wisconsin constitution, and Sec. 13.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special sessions of the legislature may be held on call of the governor, at which no business can be transacted except

as shall be necessary to accomplish the special purposes for which it was convened.' A special session was called by the governor in 1933, but for the purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934. Thus the legislature in 1935, *at the first opportunity after the tax year in which the income was received*, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in *Stockdale v. Insurance Companies, supra*." [Italics added.]

We feel that the statement of the law as to tax legislation in the case of *Welch v. Henry* is not only reasonable but is the best statement of the law and should be followed in deciding the instant case.

The Government has cited two cases on retroactive legislation: *D. W. Klein Co. v. Commissioner*, 123 F. 2d 871, and *Wilgard Realty Co. v. Commissioner*, 127 F. 2d 514. In the first case the Revenue Act of 1939 provided that it should be effective with respect to the Revenue Act of 1924 and other Revenue Acts. However, at no point in that case was the question of the retroactive nature of the legislation raised. In the latter case the period of retroactivity was about seven years. The court there found that the petitioner had done nothing it would not have done had the law been; when the exchange was made, exactly what the 1939 enactment later made it. The taxpayer was therefore not the victim of any injustice. We believe the present case can be distinguished.

The case at bar differs from all the other cases considered here in that the dissolution of the corporation and payment of tax were made under a section of the Revenue Act of 1938, which by its very terms was effective and operative *only* for the year 1938. This was a special law in order to come within its provisions dissolution of the corporation had to be completed by December 31, 1938. There is no question but that if this section of the Revenue Act of 1938 had been repealed expressly by the Revenue Act of 1939 codifying the Internal Revenue Laws, this 1940 amendment to the 1938 Act would be a mere superfluity. It is impossible to amend a law that no longer exists. It would seem equally unreasonable to permit the amendment of a law after some legislative sessions have passed—where the law by its own terms is no longer effective.

There is no question but that laws, particularly internal revenue laws, can be retroactive. However, the courts have held that there is a point of time when such retroactivity is beyond the legislative power. The rule that such amendment to legislation must come within the next session of the legislation or within a reasonable length of time as analyzed in the *Welch v. Henry* case, 305 U. S. 134, is the sounder law.

There has been some emphasis of the fact that the Revenue Act of 1940 specifically provides that Section 501 (a) shall apply to the Revenue Act of 1938 and other prior acts. We concede that this provision shows a clear intent on the part of the legislature but we believe that if Congress has not the power to pass legislation which does not come within the rule of permissible retroactivity, the fact that the legislation recites it shall be so retroactive does not cure the defect.

Reversed.

(Endorsed.) Opinion Filed May 16, 1944. Paul P. O'Brien, clerk.

Judgment

Upon petition to review a Decision of The Tax Court of the United States.

This cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the decisions of The Tax Court of the United States in this cause be, and hereby are reversed.

(Endorsed.) Judgment. Filed and entered May 16, 1944. Paul P. O'Brien, Clerk.

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that the foregoing one hundred and thirty-five (135) pages, numbered from and including 1 to and including 135, to be a full, true and correct copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of Honorable Charles Fahy, Solicitor General of the United States, counsel for the respondent, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of July, 1944.

[SEAL]

PAUL P. O'BRIEN, Clerk.

By FRANK H. SCHMIDT,
Deputy Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.